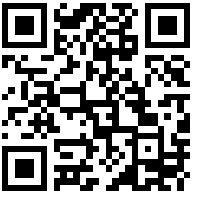

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MORAL PROBLEMS OF INTERRACIAL MARRIAGE

BY THE
REV. JOSEPH F. DOHERTY, M.A., S.T.L.

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"Our advantages flow from that new birth and adoption into the household of God, not from the eminence of our race. Our dignity arises from the praise of truth, not of our blood."

POPE LEO XIII, *Encyclical*
"Abolition of African Slavery"

DEDICATED TO

MARY

THE

MOTHER OF GOD

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FOREWORD

This dissertation is a study of the moral problems of interracial marriage in the light of Catholic moral teaching. The morality of entering upon an interracial marriage in general is considered. Particular attention is given to the morality of entering upon an interracial marriage here in the United States of America at the present time. A study of the moral validity of the anti-miscegenation laws as they exist in various States of the United States is also presented. The nature of the obligation to obey the civil law concerning interracial marriage where these laws exist in the United States and the morality of certain practices such as "passing" are also treated according to the norms of Catholic morality.

Certain opinions have been advanced in this dissertation. These opinions are not to be taken as open invitations to violate the civil law in States where anti-miscegenation laws are in effect. The practical application of these opinions, advanced as those of a private theologian, must be in accord with the virtues of charity and prudence. This dissertation must not be understood as an unqualified advocacy of miscegenation, but merely as a statement of the transcendency of personal rights in this particular situation. Thus, if a case arose involving the bond of an interracial marriage in which the Catholic Church were involved, e.g., in the case of a non-baptized person about to enter the Catholic Church and desiring some authoritative statement on the validity of his interracial marriage contracted in contravention of the State laws, this case should be referred to the judgment of the Holy See.

There is an essential unity of all men based on their unity of origin, nature, destiny, and means to attain that destiny. All men have equal rights to the means to attain their temporal and eternal destiny. The Catholic Church recognizes the existence and value of individual and group differences, but insists that these are not designed by the Creator to form the basis for the denial or restriction of fundamental rights. The rights of the individual and the family are to be left reasonably free and untrammeled in action unless the common good or the interests of others are impaired.

These are some of the elements of the problems arising from the prohibition of interracial marriage.

Interracial marriage, with respect to its frequency of occurrence, is not a significant phase of American life. It seems true that the minority group as a group is as disinterested in contracting an interracial marriage as is the majority group. It also seems true that there is no important influence at work positively advocating it. The question may be asked, why then is so much attention paid to it?

Marriage is, without doubt, the most intimate social relationship experienced by man. It has become a symbol of group solidarity: the stronghold to be guarded at any price. Thus, in a certain sense, interracial marriage with its associated problems *is* the race problem. A certain equality is demanded of both parties to a marriage. In fact, marriage implies a social equality of parties. When interracial marriage is permitted, a certain basic equality is admitted.

The author wishes to take this occasion to express his gratitude to His Excellency, the Most Reverend Bartholomew J. Eustace, S.T.D., Bishop of Camden, for the opportunity of pursuing graduate studies in Sacred Theology at the Catholic University of America. He is deeply grateful to his major Professor, Very Reverend Francis J. Connell, C.SS.R., S.T.D., for his guidance and generous assistance in the preparation of this work; to the Reverend Raphael Huber, O.F.M. Conv., S.T.M., and the Reverend Thomas Martin, S.T.D., who read and approved the manuscripts and who made many helpful suggestions. He is grateful to the Right Reverend Monsignor Augustine T. Mozier, M.A., Officialis of the Diocese of Camden, for many expressions of confidence and encouragement during all his years of study. A special word of thanks is due to the Right Reverend Monsignor Howard J. Carroll, S.T.D., and the Legal Department of the National Catholic Welfare Conference who assisted in the preparation of the legal chapter of this dissertation; to the staff of the Congressional Library who by their unfailing kindness and generous cooperation eased the burden of work attached to research; and to the Reverend Gerard Sloyan, Ph.D., for his kind help. To the many others who helped, a sincere word of thanks is offered.

CHAPTER I

INTRODUCTION

Racism and the Church

Racism is the theory that one ethnic group is condemned by the laws of nature to hereditary inferiority and another group is marked off as hereditarily superior. Its corollary maintains that the hope of civilization is in keeping the one race pure and eliminating the inferior group, or keeping it segregated.

The influence exerted by the teaching of the classical racists upon the American racial scene is not to be minimized.[1] Never-

[1] "Racial prejudice against the Negro is still strong in the South, where Amendment 15 to the Constitution . . . is sometimes indirectly violated and where sporadic lynchings still take place. Exclusion of Orientals indicates racial fears of Western states. Selective immigration with restrictions upon certain inferior European races is a *de facto* recognition of a fundamental tenet of racial theory." Louis L. Snyder, *Race, a History of Modern Ethnic Theories* (New York: Longmans, Green, 1939), p. 227.

"Race theory in the United States went through three distinct stages. Its spiritual background was laid by a group of historians who found it expedient to emphasize the Teutonic and English history. Later, race theorists called attention to the affinity of the Anglo-Saxon races (abruptly terminated by the Second World War) and sought for scientific affirmation of the Nordic thesis as a basis for political development. Finally, there developed the doctrine of the struggle for power between the white (including the American) races and the colored races, an ideology which may be expected to gather momentum in the future, considering the politico-economic awakening of the Asiatic nations." *Ibid.*, p. 228.

Foremost among the classical racists are Arthur de Gobineau who expressed his belief in race and aristocracy as the basic elements in civilization in his *Essai sur l'inegalité des races humaines* (1853-1855), and Houston Stewart Chamberlain, an Englishman, who took over Gobineau's race doctrine and moulded it into basic Germanic racial doctrine. His work, *The Foundations of the Nineteenth Century* (1899), supported the thesis that virtue and civilization are products of the "Aryan race" and are endangered by the "Semitic race." In the United States racism did not lack its champions: Madison Grant (1865-1937) wrote *The Passing of a Great Race, or the Racial Basis of European History* (1916). He accepted wholeheartedly the doctrine of the superior Nordic race and borrowed

theless, at the very beginning of this treatment it is imperative to insist that this is not the only, nor is it necessarily the major factor involved in the complex fabric of the general racial problem here in the United States of America. To do complete justice to the racial mentality would involve an investigation into its deep and far-flung roots — economic, historical, sociological, anthropological, ethnological, and religious.

Father John LaFarge, an astute observer on racial matters, has written:

> Moreover, rejection of racism still leaves us with the concrete problems of the relations of the different races in the world or within the boundaries of a given country. While Christian teaching concerning the unity of the human race, the brotherhood of man and the dignity of the human person supply the unalterable principles concerning these relations, the scientifically ascertainable facts concerning the validity and permanence of racial inheritance greatly aid in the *application* of those principles to the contacts of daily life.[2]

In any problem concerning human relations, and eminently so in the field of racial relations, the *essential worth of man* is of primary importance.[3] Since the racists have rejected the common denominator of mankind, namely, spiritual dignity, aptly expressed in the phrase *essential worth of man,* any attempt to arrive at a solution of the vexing racial problems arising out of its denial must

heavily from Chamberlain's *Foundations* and Gobineau's *"Essai."* Henry Fairfield Osborn, a contemporary of Grant, and Theodore Lothrop Stoddard (b. 1883) accepted the same fundamental racism in their writings. Cf. Snyder, *ibid.;* Ruth Benedict, *Race: Science and Politics* (New York: Viking, 1945), pp. 97 ff.; E. B. Reuter, "Racial Theory," *American Journal of Sociology,* L (1944-1945), 452-61.

[2] John LaFarge, "Racial Truth and Racist Error," *Thought,* XIV (March, 1939), 22.

[3] "Racism, however, is concerned with no accidental circumstances or any moral or acquired traits. It is concerned with the *essential worth of man,* that which makes him necessarily and inevitably superior or inferior to his fellows. That essential worth it places wholly in the fact of physical, biological inheritance, in the 'blood' he shares as member of a race. Since man's essential worth is determined by his biological inheritance of 'blood,' all moral or spiritual values, whether of the individual or society, arise solely from the fact of physical descent." *Ibid.,* p. 20.

await its recognition.[4] This common denominator, established by the law of nature and untiringly defended by the Catholic Church, is the major premise of all the discussion which follows.[5]

Holy Mother the Church has ever sounded the call for social justice. Even if this were not so she would be forced to take an interest in racial problems for the sake of doctrinal consistency.[6]

[4] In a letter to His Eminence Cardinal Baudrillart, Rector of l'Institut Catholique, the Sacred Congregation of Seminaries and Universities, April 13, 1938, listed among others, the following propositions to be refuted:

(1) "The human races, by their natural and unchangeable characteristics, are so different that the lowest of them is farther removed from the highest race of men than from the highest species of animal.

(2) "The vigor of the race and purity of blood must be preserved by every possible means; whatever conduces to this end is *ipso facto* honorable and licit.

(3) "From the blood, seat of racial characteristics, all the intellectual qualities of man derive as from their principal source." *Canon Law Digest*, T. Lincoln Bouscaren, editor (Milwaukee: Bruce, 1942), II, 395 f.

[5] This premise is not without scientific support. In a statement on racism by the American Anthropological Association, published at its meeting in New York City, December 28, 1938, the findings of a committee headed by the Rev. John M. Cooper were summarized in this resolution: "Be it resolved, That the American Anthropological Association repudiates such racialism and adheres to the following statement of facts: (1) Race involves the inheritance of similar physical variations by large groups of mankind, but its psychological and cultural connotations, if they exist, have not been ascertained by science. (2) The terms Aryan and Semitic have no racial significance whatsoever. They simply denote linguistic families. (3) Anthropology provides no scientific basis for discrimination against any people on the ground of racial inferiority, religious affiliation or linguistic heritage." *Science*, 89 (January 13, 1939), n. 2298; cf. LaFarge, *op. cit.*, p. 23; Benedict, *op. cit.*, p. 163.

[6] "Such issues as I have in mind, like the racial issue, in their solution one way or the other, will quite definitely affect the very basis of religion. The Church takes the side of the Negro, for instance, not for what seems to the world to be the purely opportunistic purpose of gaining adherents among that racial group (though from a supernatural point of view that purpose also exists) but for the larger reason that it is a matter of pure self-defense. There are questions of human relations which the Church cannot see go by default, on penalty of losing its own identity. I say its identity, not merely its influence, for in this type of issue there lies a principle which is vital to the religious position itself of the Church." Wilfrid

She does not remain aloof from them, for her leader, Pope Pius XII, saw

> a marvelous vision, which makes us see the human race in the unity of one common origin in God, "one God and Father of all, Who is above all, and through all and in us all" (Ephesians iv, 6); in the unity of nature which in every man is equally composed of material body and spiritual, immortal soul; in the unity of immediate end and mission in the world; in the unity of dwelling place, the earth, of whose resources all men can by natural right avail themselves, to sustain and develop life; in the unity of the supernatural end, God Himself, to Whom all should tend; in the unity of the means to secure that end.[7]

And the same sovereign Pontiff protested that

> In the light of this unity of all mankind, which exists in law and in fact, individuals do not feel themselves isolated units, like grains of sand, but united by the very force of their nature and by their internal destiny into an organic, harmonious mutual relationship which varies with the changing of times.[8]

On the other hand, the Church also maintains an appreciation of the different civilizations and cultures which are an expression of the diverse groups in the one great human family:

> All that in such usages and customs is not inseparably bound up with religious errors will always be subject to kindly consideration and, when it is found possible, will be sponsored and developed.[9]

She insists that

> Those who enter the Church, whatever be their origin or their speech, must know that they have equal rights as children in the House of the Lord, where the law of Christ and the peace of Christ prevail.[10]

Parsons, "Nationalism, Racism, and the Church," *Thought,* XIV (March, 1939), 53.

[7] Pope Pius XII, Encyclical *Summi pontificatus, Acta Apostolicis Sedis* (hereafter referred to as *A.A.S.*), XXXI (October 20, 1939), 413-53; English translation, *ibid.*, p. 547.

[8] *Ibid.*, p. 548.

[9] *Ibid.*

[10] *Ibid.*, p. 549.

And after Holy Mother the Church has done all this, she can and actually does, in the words of Pope Pius XII,

> . . . proclaim to all Our sons, scattered over the world, that the spirit, the teaching and the work of the Church can never be other than that which the Apostle of the Gentiles preached: "putting on the new (man), him who is renewed unto knowledge, according to the image of him that created him. There is neither Gentile nor Jew, circumcision nor uncircumcision, barbarian nor Scythian, bond nor free. But Christ is all and in all." (Colossians, iii, 10, 11.)[11]

An organization cannot make such claims in the muddled world of today and then, ostrich-like, bury its head in the sands of indifference and hear no evil. *The Church has never done so.* Time and time again she has insisted on the *essential worth of man.*[12] The condemnation of racism by Pope Pius XI is only one of such insistences.[13] The Church therefore has the right and she has the obligation to insist that human conduct be in accord with the divine revelation entrusted to her care.[14]

[11] *Ibid.*

[12] "I have said that the Code of Justinian, which ruled Europe for a thousand years, and on which much of Papal legislation was founded, consecrated the liberties of the Jews. The Magna Charta of Jewish freedom in Europe is the Bull of Pope Clement III in 1190, which was inserted into the Decretals." Parsons, *op. cit.*, p. 59.

[13] Pope Pius XI, Encyclical *Mit brennender Sorge, A.A.S.*, XXIX (March 14, 1937), 145-67.

[14] "These three principles, then, unity, universality [of the all-enveloping love of Christ], and universal charity, make up the code of Christianity which has been officially preached, and, in spite of some breaches by individual Catholics, generally practiced by the Church. It is true that it does not immediately and directly enter into the question of the rights of citizenship. Formally, the Church's rule of equality falls only on the rights of all men to the same spiritual benefits, regardless of race. But indirectly, the application is clear. First of all, the implication that some men do not possess inalienable rights, but only those of certain races, is implicitly condemned by the first of the three principles mentioned above, and will always be resisted by the Church. Moreover, laws affecting marriage, the home, and the school, and proceeding from racial exclusivism will fall foul of ecclesiastical policy and teaching." Parsons, *op. cit.*, pp. 63 f.

Holy Mother the Church has even more right to appear on the racial scene when it revolves about the institution of marriage. No other organization bears credentials to teach authoritatively concerning marriage comparable to those she bears.[15] It becomes the task, then, of the individual Catholic theologian to seek out her teaching and to present it as a safe guide to other men.

Purpose of This Study

It is the purpose of this study to investigate, in the light of Catholic moral theology, the various moral problems presented by interracial marriage. After an objective search into the many factors involved, it is hoped that certain conclusions will be derived which may prove helpful to those who are confronted with the same problems.

Moral theology, in light of which this study is to be conducted, is a science which states and explains the laws of human conduct in relation to God, the supernatural end of man.[16] Consequently, this study will concern itself not only with the human acts and worldly circumstances which create the problems, but also with principles of the Eternal Law in the light of which judgment is to be passed on the problems presented.[17] The fact that man has been given an eternal destiny and that his conformity to the Eternal Law of God has been set up as a condition for achieving this destiny are major presuppositions of this, as well as of all, studies in morality.

[15] Matt. xxviii, 19; *Codex Iuris Canonici* (Westminster: Newman, 1942), Canon 1038, §1 (hereafter referred to as *C.I.C.*).

[16] *"Theologia moralis definitur: scientiae theologiae pars quae de actibus humanis in ordine ad Deum finem supernaturalem agit ordinandis secundum principia revelata."* B. H. Merkelbach, *Summa Theologiae Moralis* (3 vols.; Paris: Desclée de Brouwer et Soc., 1938), I, n. 3.

[17] Eternal Law: "The divine act of will by which God eternally and necessarily wills that all creatures should tend to their proper ends, that is, that all creatures should observe the order which the divine wisdom has constituted." Paul H. Furfey, *Three Theories of Society* (New York: Macmillan, 1937), p. 242.

The Definition of the Term "Race"

The need to define one's terms is fundamental in any discussion. There are very few terms that have received more varying meanings than the term *race*. Therefore, a certain amount of caution must be observed in presenting a definition scientifically acceptable, for so many meanings have been attached to the term without regard to this criterion.

Analysis of the definitions available manifests complete agreement on the purpose of race, viz., the division of mankind into groups. What the bond is among the individuals in the groups varies with the point of view of the one giving the definition. It may be anthropological, ethnological, nationalistic, or merely a social denomination. Thus the efficient cause of this grouping could be the mere possession of common characteristics, anatomical features derived from common heredity, "blood-connected" heredity, physical characteristics, traits of temperament, tastes, language, aptitudes, frame of mind, cultural values, and even political opinions.[18]

[18] "As a brief definition of race might be given — a persistent strain, within any species, of broadly blood-connected individuals carrying steadily, i.e., hereditarily, more or less of well defined physical characteristics which distinguish them fairly from all other strains or races. As criteria of a *race* therefore may be stipulated an aggregate of plain, not shared, hereditary characteristics, of such a nature as to distinctly set apart the strain carrying them from all others." Aleš Hrdlička, *Scientific Aspects of the Race Problem* (New York: Longmans, 1941), p. 161.

"The definition of the 'Negro race' is thus a social and conventional, not a biological concept. The social definition and not the biological facts actually determines the status of an individual and his place in interracial relations. This also relieves us of the otherwise cumbersome duty of explaining exhaustively what we, in a scientific sense, could understand by 'race' as an ethnological and biological entity. In modern biological or ethnological research 'race' as a scientific concept has lost sharpness of meaning, and the term is disappearing in sober writings. In something even remotely approaching its strict sense, it applies only to exceptionally isolated population groups, usually with a backward culture, which thus seems to be the concomitant of 'racial purity.'

"Thus the scientific concept of race is *totally inapplicable at the very spots where we recognize 'race problems.'* It is being replaced by quantitative notions of the relative frequency of common ancestry and differentiat-

Admittedly, the term *race* must not be too inflexible. On the other hand, to make it too comprehensive would destroy its scientific value. It is deemed advisable therefore to select a definition which is in accord with the scientific acceptation and let it serve as the basis of discussion of the moral problems of interracial marriage.

In such a discussion it is reasonable to accept a definition of race which involves "(1) heredity, and (2) traits transmitted by heredity which characterize all the members of a related group." [19] Cultural and psychological considerations are not irrelevant, but their specific inclusion is not warranted by scientifically ascertainable facts.[20]

ing traits." Gunnar Myrdal, *An American Dilemma, the Negro Problem and Modern Democracy* (New York: Harper, 1944), p. 115.

"All authors rightfully note that the word 'race' is accepted in two meanings. Not only the general public, but scientists themselves use the word alternately in these two senses and even at times pass unconsciously from one meaning to the other. . . .

"On the one hand, race is accepted as a purely biological fact. It consists in likeness of physical, anatomical, or physiological characteristics transmitted by heredity. It is distinguished therefore very definitely, both from linguistic families, which groups populations on the basis of affinities of their language, and from cultural cycles, in which ethnography groups men on the basis of their civilization according to the criteria borrowed from their tools, their customs, their weapons or their institutions. It would be desirable if we could retain exclusively the biological or anthropological sense of the word *race*.

"But it is observed that anthropologists and biologists themselves, upon leaving their laboratory to descend into the political terrain, almost inevitably give another meaning to the word. They then designate by the term *race* populations which present no real homogeneity from the physical point of view, but psychic or social rather than biological similarities. The word race thus takes on an ethnic sense, and the term 'Jewish Race' is used, whereas the heterogeneity of our contemporary Jews is, it seems, an established fact. . . ." Joseph T. Delos, "The Rights of Man *vis-à-vis* of the State and the Race," in *Race: Nation: Person, a Symposium,* Joseph Corrigan and J. Barry O'Toole, editors (New York: Barnes and Noble, 1944), pp. 53 f.

[19] Benedict, *op. cit.,* p. 11.

[20] Cf. Resolution of American Anthropological Association, cited *supra,* n. 5.

In the pages to follow, therefore, the term *race* will be used in the following sense:

> Race is the classification of large groups of mankind based on traits which are hereditary.[21]

Whether or not a particular group of people is a race in the above sense is a determination not within the scope of this work. Consequently, the problems to be examined here will involve groups of people who are universally and unquestionably regarded as races in the proposed sense of the term.[22]

Miscegenation and Interracial Marriage

Miscegenation, a broader term than interracial marriage, refers here to the mixing of different racial groups by intermarriage or mere interbreeding. Miscegenation is a fact. Inbreeding of different color groups has appeared in the records of civilized groups throughout history. However, it is not the purpose here to outline the history and give statistics of miscegenation throughout the world. It will be sufficient to demonstrate that it does exist in some places and in such numbers that it warrants consideration as a situation posing grave moral problems.

In a recent study, figures were submitted which totaled the number of Indians, Mestizos (mixture of white, Negro, and Indian), Negroes, and mulattoes (mixture of white and Negro) for Greenland, Alaska, Canada, United States, Mexico, the Antilles, Central and South America for the year 1940: Indians — 16,211,670; Mestizos — 34,362,981; Negroes — 25,851,708; mulattoes — 15,289,011.[23] The mulattoes in the United States of America are not included in this summary as mulattoes. They are classed as Negroes, for the 1940 census made only three race distinctions, namely, white, Negro, and "other races." [24]

[21] Cf. Coon, *op. cit.*, p. 11; Benedict, *op. cit.*, p. 11.

[22] On the Jews as a race consult Maurice Fishberg, *The Jews* (London: Walter Scott Publishing Company, 1911), pp. 515 ff.; Coon, *op. cit.*, pp. 442-44; Gruenthaner, *op. cit., passim.*

[23] Frank Tannenbaum, *Slave and Citizen* (New York: Knopf, 1947), table inserted between pp. 15 f.

[24] U. S. Bureau of Census, *Sixteenth Census of the United States:* 1940 (Washington: Government Printing Office, 1943), II, 9.

On the other hand, the statistics of the United States Bureau of the Census for the years 1850 to 1910 establish the fact of miscegenation on a large scale at that time. Selected figures are herewith given:[25]

Census Year	Negroes in United States	Pure Black United States	Mulattoes in United States	Mulattoes as % of All Negroes
1870	4,880,009	4,295,960	584,049	12
1890	7,488,676	6,337,980	1,132,060	15.2
1910	9,827,763	7,777,077	2,050,676	20.9

Since 1910 no reliable figures have been gathered by the Bureau of Census on the number of mulattoes. However, it has been estimated that in 1930 there were probably 3,714,744 mulattoes in the United States. This is 31.2 percent of the total of 11,891,143 Negroes.[26] As high as this may seem, there are others, reliable authorities, who go beyond this figure in their estimate of the number of mulattoes.[27]

The growth of a mulatto group within a territory is unequivocal evidence of miscegenation. Hence, the phrase "amount of miscegenation" becomes more significant if it is measured in terms of the number of mulattoes. The difficulty, however, in accepting this norm is that it is not possible to determine with any great accuracy the proportion that is the product of the union of Negro and white and that which is the product of marriage between two mulattoes. It is safe to conclude only that miscegenation in the past has been on quite a large scale. The possibility that the growth of the mulatto group can be accounted for by the marriage of two mulattoes will not allow the conclusion that Negro-white marriages are responsible to any great degree for this subsequent growth.[28]

[25] U. S. Bureau of Census, "Negroes in the United States," *Census Bulletin,* No. 129 (Washington: Government Printing Office, 1916), p. 60.

[26] Rev. A. H. Shannon, "Racial Integrity of the American Negro," *Contemporary Review,* CXLIV (1933), 584.

[27] Cf. Klineberg, *op. cit.*, pp. 268 ff.

[28] Cf. Louis Wirth and Herbert Goldhamer, "The Hybrid and the Problem of Miscegenation," *Characteristics of the American Negro,* Otto Klineberg, editor (New York: Harper, 1944), pp. 268 f.

Reliable statistics on the number of interracial marriages as distinct from casual sex alliances and the more or less stable forms of concubinage are difficult to obtain. That the number of actual Negro-white marriages in the United States is relatively small compared to the total amount of Negro-white miscegenation is indicated by several studies of a limited nature. In one such study of Negro-white families in the United States before the Civil War it was found that of 136 unions only five were marriages.[29] In Boston, a center of the abolitionist activity, during the period 1855-1866 there were ninety-five Negro-white marriages, but this number is not representative of the total slave period nor of the rest of the United States.[30]

Only limited and unsatisfactory data are available on Negro-white intermarriage in other parts of the United States. From 1874 to 1893 Michigan had a total of 111 intermarriages; Connecticut from 1883 to 1893 had 65 intermarriages; during the same period Rhode Island had 58; from 1855 to 1887 Boston had 600; Philadelphia had 27 in the period 1900 to 1904.[31] In the State of New York, exclusive of New York City, there was a total of 481 Negro-white marriages in the period 1919-1937. In Boston there were 276 Negro-white marriages between 1919 and 1938.[32] These figures are not meant to present the complete picture and are not representative of the country as a whole. They merely indicate that such marriages exist where they are allowed by law. Statistics from other countries throughout the world would provide even

[29] Caroline Bond Day, *A Study of Some Negro-White Families in the United States, Harvard African Studies,* Vol. X (Cambridge, 1932); also reported in Klineberg, *op. cit.*, p. 266.

[30] Klineberg, *op. cit.*, p. 267.

[31] Summary table, *ibid.*, p. 277.

[32] *Ibid.*, pp. 277, 280. "There was a total of 170,636 marriages contracted in Los Angeles County during the period 1924-33. Most of these — 165,984, or 973 per 1000 — were clearly intraracial marriages, that is, marriages between whites and whites, yellow-browns and yellow-browns, Negroes with Negroes. The balance, 4,642 or 27 per 1000, appear in the license records as interracial marriages, that is, marriages between persons belonging to different major races." Constantine Panunzio, "Intermarriage in Los Angeles [County]," *American Journal of Sociology,* XLVII (1941-42), 691.

more conclusive evidence concerning miscegenation and interracial marriage. They would demonstrate its existence between whites and yellows, yellows and black, and various combinations of all three, but to add more would be to belabor the simple fact that miscegenation and interracial marriage are part of modern human experience.[33]

Objections to Interracial Marriage

It is not difficult to find examples of manifest opposition to interracial marriage. The objections most serious in their consequences are those based upon "racist" theories and racial distrust. On the other hand, considering the temper of the times and the social disapproval in certain localities, some have objected to interracial marriage on the grounds of the good of the offspring, the danger of putting too great a strain on the marital bond, and the endangering of a happy community of life.[34]

In certain States of this country there are also laws forbidding the intermarriage of persons of different race. Because they are to be studied in detail in a later part of this work it will be enough to give a brief prospectus of the laws here with two examples of the laws.

Although the most prominent of these laws are directed against the marriages of Negroes and whites, there are various other statutory provisions which outlaw the marriages of white persons with members of races other than the Negro. There are some fourteen States, mostly in the Far West, which have enacted laws that expressly or implicitly forbid marriage between persons of the Caucasian and Mongolian races. Ten States expressly or implicitly prohibit the marriages of whites and Malayans; four forbid unions of whites and Indians, and there are a few other prohibitions of

[33] Cf. E. V. Stonequist, *The Marginal Man* (New York: Scribners, 1937), chap. ii; Louis L. Snyder, *op. cit.*, Part 7.

[34] Cf. A. Ravizza, "Matrimonii misti e meticci nella Colonia Eritrea," in *Rivista d'Italia*, XIX (1916), pt. ii, pp. 345-350; Theodor Grentrup, "Die Rassenmischehen in den deutschen Kolonien," in *Görres-Gesellschaft zur Phlege der Wissenschaft im Katholischen Deutschland, 25 heft* (Paderborn: Schoningh, 1914), *passim;* Francis J. Gilligan, *Morality of the Color Line* (Washington: Catholic University of America Press, 1928), pp. 82 ff.

minor importance. Negroes and Indians are forbidden to contract marriage with each other in Louisiana and Oklahoma. North Carolina bars the unions of Indians of Robeson County with persons of Negro blood to the third generation inclusive. The union of a Malayan and a Negro is unlawful in Maryland. In general, it may be stated that interracial marriage is declared void and not just voidable in those States where it is unlawful.[35]

The laws against intermarriage of Negroes and white persons are herewith given for the States of Maryland and Virginia; Maryland's law reads as follows:

> All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and shall be void; and any person violating the provisions of this Section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years; provided, however, that the provisions of this Section shall not apply to marriages between white persons and members of the Malay race, or between negroes and members of the Malay race, or between persons of negro descent to the third generation, inclusive, and members of the Malay race, existing prior to June 1, 1935.[36]

The same Code of Maryland Law (Art. 27, Section 440) provides a fine of one hundred dollars for ministers who perform such marriages.

The Virginia Code reads as follows:

> What marriages are void without decree. — All marriages between a white person and a colored person, and all marriages which are prohibited by law on account of either of the

[35] Charles S. Mangum, Jr., *The Legal Status of the Negro* (Chapel Hill: University of North Carolina Press, 1940), pp. 253 f., 244; Culver B. Alford, *Jus Matrimoniale Comparatum* (New York: Kenedy, 1938), n. 206; *infra*, ch. 3.

[36] H. E. Flack, editor, *The Annotated Code of the Public General Laws of Maryland* (Baltimore: Lord Baltimore Press, 1939), Art. 27, Sect. 445.

> parties' having a former wife or husband then living, shall be absolutely void, without any decree of divorce, or any legal process.[37]

In another place in the Virginia Code it is further provided that:

> It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this act.[38]

The above laws may be taken as representative of the type of law existing in those States which forbid the intermarriage of Negroes and whites.

The Nature of Marriage

Abstracting from its sacramental nature, marriage is a contract by which a man and a woman mutually confer and accept the perpetual and exclusive right to the use of each other's body for the purpose of performing acts which are in themselves suitable for the procreation of children.[39] Whereas every marriage is a contract, only those marriages which are contracted between baptized persons are sacraments. On the other hand, the contractual element is so essential that if it were lacking, marriage could not

[37] *Virginia Code of 1924 — Annotated* (Charlottesville: Michie, 1924), par. 5087.

[38] *Ibid.*, Par. 5099a, n. 5.

[39] "*Matrimonium, quatenus est contractus in se spectatus seu abstractione facta a ratione sacramenti, definiri potest: contractus quo vir et mulier sibi mutuo tradunt et acceptant jus in corpus, perpetuum et exclusivum in ordine ad actus per se aptos ad generationem.*" A. DeSmet, *Tractatus Theologico-Canonicus de Sponsalibus et Matrimonio* (4th ed.; Brugis: Beyaert, 1927), nn. 75-76.

exist.[40] Marriage can be considered as a contract or as a state, *in fieri* or *in facto esse* respectively. Marriage *in fieri* is the act of setting up the marriage bond. This consists in the mutual consent itself. As a state deriving from this mutual consent it consists in the enduring conjugal union.[41]

The Catholic teaching on marriage may be summarized in this fashion. Marriage is a contract, and the resulting state of matrimony is indissoluble by Divine Law, irrespective of human legislation. Instituted by God, it is subject to the Divine Law, and for that reason cannot be nullified by human law. Those contracting marriage do so of their own spontaneous wills, but when they assume the contract and its obligations they must do so unconditionally. Marriage is intended primarily by the Author of Life to use man as His helper in propagating life, namely, in the begetting of children and educating them. Its secondary purposes are mutual society and help, and a lawful remedy for concupiscence. What is more, marriage is monogamic and indissoluble. Death alone dissolves a sacramental marriage when consummated.[42]

With the Christian dispensation came the revocation of the dispensation from monogamy granted in the Mosaic Law. Christ reinstated the original Divine Law of monogamic and indissoluble marriage and, most important, He raised Christian marriage to the dignity of a sacrament.[43]

The Council of Trent emphasized this same teaching: "If anyone should say, Matrimony is not truly and properly one of the seven sacraments of the Gospel law, instituted by Christ, but an invention of men in the Church, not conferring grace, let him be

[40] Cf. Pope Leo XIII, Encyclical, *Arcanum divinae sapientiae*, February 10, 1880, *Acta Sanctae Sedis* (hereafter referred to as *A.S.S.*), XII (1879-80), 388 ff.

[41] De Smet, *op. cit.*, nn. 75-77; Petrus Cardinalis Gasparri, *Tractatus Canonicus de Matrimonio* (Editio nova; Vaticana Civitas: Polyglot, 1932), I, nn. 1-10.

[42] Cf. Pope Leo XIII, *op. cit.*, *A.S.S.*, XII (1879-80), 388; Pope Pius XI, Encyclical *Casti connubii*, December 31, 1930, *A.A.S.*, XXII (December, 1930), 541 f.; De Smet, *op. cit.*, nn. 77-79, 83-84, 94-102.

[43] Gen. ii, 24; Matt. xix, 3 ff.; Luke xvi, 15 ff.; Mark, x, 11 ff.; 1 Cor. vii, 2 ff.

anathema." [44] The Christian marriage contract and the sacrament are inseparable and indivisible.[45] In addition, the consent in marriage by virtue of Christ's legislative act produces, not only sanctifying grace, but its own peculiar sacramental grace.[46] It can be said, therefore, that whenever the marriage contract is duly made between two baptized persons, the sacrament is truly effected.[47] As a corollary of this fundamental truth, the moral and canonical aspects of matrimony in the Christian dispensation are necessarily determined by the sacramental nature of the marriage contract.[48]

Moral Problems of Interracial Marriage

This chapter has presented the background of the moral problems arising from interracial marriage. The study is to be conducted in the light of Catholic moral principles. These principles are contained in the Divine Eternal Law as manifested in the very nature of man and as given to man by supernatural revelation. Consequently, regard will be had in the following pages both to the demands of the natural law and the divine Christian revelation, to man's natural and supernatural well-being.

Some effort has also been made to submit an acceptable definition for the term *race* as it will be needed here. The fact of miscegenation and interracial marriage has been pointed out. To indicate the problems associated with interracial marriage, some modern sources of opposition were given. The nature of marriage

[44] Henricus Denzinger, editor, *Enchiridion Symbolorum* (hereafted cited as *Denz.*) (21-23 ed.; Friburgi: Herder, 1937), n. 91 cites the Council of Trent, Sess. xxiv, can. 1: *"Si quis dixerit matrimonium non esse vere et proprie unum ex septem Legis evangelicae sacramentis, a Christo domino institutum, sed ab hominibus in Ecclesia inventum, neque gratiam conferre, anathema sit."*

[45] *Denz.* 1766 lists the opposite as one of the errors condemned by Pope Pius IX; cf. De Smet, *op. cit.*, nn. 162 ff. "1. Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos. 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum." Canon 1012, *C.I.C.*

[46] Council of Trent, Sess. xxiv, *Denz.* 969; De Smet, nn. 182-84.

[47] Cf. De Smet, *op. cit.*, nn. 411 ff.; Gasparri, *op. cit.*, I, nn. 26 ff.

[48] Cf. De Smet, *op. cit.*, nn. 171 ff.

in general and of Christian marriage specifically, was outlined for a basis of future reference.

Likewise, some advance light was thrown on the outlook of the Church on interracial marriage in general. The question of establishing principles is a matter of culling ecclesiastical and theological sources. The real problems arise in applying these principles to the conditions as they exist here and now. If this work has any contribution to make, it will be in marshaling the ecclesiastical literature available on the subject and in the solution of such questions as the following: Should interracial marriage in general be encouraged, discouraged, or just tolerated? How about conditions here in the United States? What should be the attitude of Church officials? Officials of the State? What about the parties to the marriage where it is forbidden by law and custom? Where it is not forbidden by law but is forbidden by custom? Where there is no objection? What of the morality of "miscegenation" laws as they exist in certain States of the United States today? Are they just laws? Should they be obeyed?

Interracial Marriage and the Race Question

Almost everyone who writes about the race question goes to great pains to insist on the irrelevancy of intermarriage and race problems. With regard to the frequency of occurrence, interracial marriage is not a significant phase of American life. It seems true that the minority group as a group is as disinterested in contracting an interracial marriage as is the majority group. It also seems true that there is no important influence at work positively advocating it. Why, then, is so much attention paid to it?

The answer to this question seems to be found by investigating the significance of marriage. It is, without doubt, the most intimate social relationship experienced by man. It is perhaps not an over-simplification to contend that it has become the symbol of group solidarity: the stronghold that is to be guarded at any price. Hence, just as marriage is the ultimate in intimacy, so the prevention of miscegenation has become the ultimate in social separation. Intermarriage of the races and race problems *are* irrelevant if race

problems are conceived merely in terms of unjust discriminations against the minority group. However, in a certain sense the intermarriage of the races *is* the race problem, and hence is established the relevancy of intermarriage and race problems. For intermarriage is the race problem in the sense that it is its symbol. Symbols are for the most part a simplification of a more complex and even abstract reality. For this reason it is generally admitted that if race prejudice were to cease there would be less objection, if any, to interracial marriage. Whether interracial marriage would follow on a large scale, or whether it would be regarded as desirable even under more favorable circumstances, are questions that are better left to the future to answer. It is certain that the present information available is useless in predicting the future of race problems. So much depends on the cooperation of man's free will with God's freely given grace.

Interracial marriage being a symbol of the great problem of the alleged incompatibility of races, it is felt that a reasonable inquiry into these marriage problems would help considerably to a better understanding of the whole question of race. The evaluation of a symbol should be a contribution. The solution of practical problems where a solution is possible is always a contribution. An earnest attempt to understand the problems involved in interracial marriage is amply repaid by the widened outlook it provides. One must, of course, start with the assumption that there are reasonable and just men in all racial groups.

CHAPTER II

INTERRACIAL MARRIAGE CONSIDERED IN THE LIGHT OF CATHOLIC MORALITY

Christian Principles Applied to Interracial Marriage

Charity and justice are foremost, but there are other fundamental principles guiding the Church in her mission to the races of the world, principally those of the essential unity of all men and the essential equality of all men in the sight of God. These latter two principles are part of the great body of truth she must preserve and consistently apply if she is to maintain her position as the divinely appointed custodian of truth.

The Church teaches that in the sight of God one race is in every respect as good as another. All races are descended from the first man and woman, Adam and Eve, whom God created in the beginning. The Son of God became man and died for the souls of black and yellow as well as for the white man. Black and yellow are destined for membership in the one Church that Christ has established. Their final goal is the same supernatural happiness in heaven that is appointed for the white man. Colored men receive from their Creator the graces and helps necessary to reach their goal as do their white brothers. The sacraments which bring strength and comfort to the white man in the journey of life are available to the Negro, Chinese, and Japanese also. The Catholic priest is ordained to labor for all the members of his flock, whatever be their race. In Christ's Church all men are equal.

The essential unity of all men derives from common origin, common nature, common destiny in this life and the life to come, and common means to attain this destiny.[1] This is merely another way of stating that all men are made to the image and likeness of God and are the object of His special love and providence.[2] It

[1] Pope Pius XII, Encyclical *Summi pontificatus*, *A.A.S.*, XXXI (20 October, 1939), 413-53; English translation, *ibid.*, p. 547.

[2] Cf. Wilfrid Parsons, "Nationalism, Racism, and the Church," *Thought*, XIV (March, 1939), 61.

would be heretical to exclude any particular group of men from the universal scope of this doctrine.[3]

It follows from the essential unity of all men that all men are essentially equal. All men have equal rights to the necessary means to their assigned destinies. One of these necessary means is the liberty to exercise natural rights. All men are called to the unity of the Church, as the ordinary means of eternal salvation, hence, within her perfect unity all "whatever be their origin or their speech, must know that they have equal rights." [4]

Add to these two fundamental principles of the essential unity of men and their essential equality the formal teaching of Jesus Christ, which is one of brotherly love for all men: "I say to you: love your enemies, do good to those who hate you." (Matt. v, 44.) Just as the principles of essential unity and equality are exclusive of no human being, but include all mankind, so too, the law of charity is universal. Saint Paul makes this clear again and again throughout his Epistles, for example:[5]

> For there is no distinction between Jew and Greek, for there is the same Lord of all, rich towards all who call upon him. (Rom. x, 12)
>
> There is neither Jew nor Greek; there is neither slave nor freeman; there is neither male nor female. For you are all one in Christ Jesus. (Gal. iii, 28)
>
> Therefore, you are now no longer strangers and foreigners, but you are citizens with the saints and members of God's household. (Eph. ii, 19)

To meet the objection that apparent inequalities among men

[3] "*Deus omnipotens omnes homines sine exceptione vult salvos fieri* (I Tim. ii, 4), *licet non omnes salventur.*" Concilium Cariasicum, 853, *Denz.* 318. "*Hunc proposuit Deus propitiatorem per fidem in sanguine ipsius, pro peccatis nostris* (Rom. iii, 25), *non solum autem pro nostris, sed etiam pro totius mundi* (I Joan. ii, 2)." *Concilium Tridentinum, Sessio vi,* c. 2; *Denz.,* 794.

[4] Pope Pius XII, *op. cit.,* p. 549.

[5] Texts quoted from *The New Testament,* Confraternity of Christian Doctrine revision (Paterson: St. Anthony Guild, 1943).

may present, it is well to understand in what sense all men are equal. To this effect Pope Leo XIII writes:[6]

> It is the soul which is made after the image and likeness of God; it is in the soul that sovereignty resides, in virtue of which man is commanded to rule the creatures below him, and to use all the earth and ocean for his profit and advantage. "Fill the earth and subdue it; and rule over the fishes of the sea and the fowls of the air, and all living creatures which move upon the earth." (Gen. i, 28.) In this respect all men are equal, poor, master and servant, ruler and ruled, "for the same is Lord over all" (Rom. x, 12).

All men, therefore, are equal by virtue of their spiritual soul which is created to the image and likeness of God.

Despite individual differences of capability, diligence, health, strength, or fortune — the interests of all its subjects must be sought by the State as well as by the Church. The general principle of distributive justice required from the State is outlined in the following excerpt from the Encyclical *Rerum Novarum* of Pope Leo XIII:[7]

> But there is another and a deeper consideration which must not be lost sight of. To the State the interests of all are equal whether high or low. The poor are members of the national community equally with the rich; they are real component parts, living parts, which make up, through the family, the living body; and it need hardly be said that they are by far the majority. It would be irrational to neglect one portion of the citizens and to favour another; and therefore the public administration must duly and solicitously provide for the welfare and the comfort of the working people, or else that law of justice will be violated which ordains that each shall have his due. To cite the wise words of St. Thomas of Aquin: "As the part and the whole are in a certain sense identical, the part may in some sense claim what belongs to the whole." Among the many and grave duties of rulers who would do their best for their people, the first and chief is to act with strict justice — with that justice which is called in the schools "distributive" — towards each and every class.

[6] Pope Leo XIII, Encyclical *Rerum novarum, A.S.S.*, XXIII (May 15, 1891), 641-70; English translation from Joseph Husslein, *Social Wellsprings* (Milwaukee: Bruce, 1940), I, 190.

[7] *Ibid.*, p. 186.

What applies to individuals, likewise applies to the rights of the institution of the family as far as distributive justice is concerned. Hence, so long as the common good and the interests of others are not impaired, both the individual and the family should be allowed freedom of action.[8]

Individual and group differences, be they racial or otherwise, have always been recognized by the Church. Never has she ignored them, but rather has she viewed them in their proper perspective — as differences which exist among men who have the same call on her for the recognition of equality of rights whatever their national, racial, or linguistic origin. Pope Pius XI sums up the Catholic Church's stand on racial differences:

> The peak of the revelation as reached in the Gospel of Christ is final and permanent. It knows no retouches by human hand; it admits no substitutes or arbitrary alternatives such as certain leaders pretend to draw from the so-called myth of race and blood. . . .
>
> The Church founded by the Redeemer is one, the same for all races and all nations. Beneath her dome, as beneath the vault of heaven, there is but one country for all nations and tongues; there is room for the development of every quality, advantage, task, and vocation which God the Creator and Saviour has allotted to individuals as well as to ethnical communities. The Church's maternal heart is big enough to see in the God-appointed development of individual characteristics and gifts more than a mere danger of divergency. In their successes she sees with maternal joy and pride fruits of education and progress, which she can only bless and encourage, whenever she can conscientiously do so. But she also knows that to this freedom limits have been set by the majesty of the divine command, which founded that Church one and indivisible. Whoever tampers with that unity and that indivisibility wrenches from the Spouse of Christ one of the diadems with which God Himself crowned her; he subjects a divine structure, which stands on eternal foundations, to criticism and

[8] Pope Leo XIII, Encyclical *Rerum novarum*, *A.S.S.*, XXIII, 657 f.: "Non civem, ut diximus, non familiam absorberi a republica rectum est: suam utrique facultatem agendi cum libertate permittere aequum est, quantum incolumni bono communi et sine cujusquam injuria potest."

remodeling by architects, whom the Father of Heaven never authorized to interfere.[9]

The above general statement of principles applicable to racial problems may be briefly restated: (1) The basic law of Christianity is that of brotherly love. (2) There is an essential unity of all men based on the unity of origin, nature, destiny, and means to attain that destiny. (3) All men have equal rights to the means to attain their temporal and eternal destiny. (4) The Catholic Church recognizes the existence and value of individual and group differences, but insists that these are not designed by the Creator to form the basis for the denial or restriction of fundamental rights. (5) The rights of the individual and of the family are to be left free and untrammeled in action unless the common good or the interests of others are impaired. (6) The first and chief duty of rulers is to act with strict justice towards each and every individual and group of people subject to their rule. (7) The Church is not indifferent to ethnical or racial divisions of mankind, but insists that they are not important as far as her divine mission is concerned.

Can it be concluded from these general principles that the Catholic Church considers interracial marriage a desirable thing? On general principles it can be said with surety that the Church does not disapprove of interracial marriages as such. Further, she appreciates the fact that marriage usually forms a bond of friendship between the families of the contracting parties. For this reason, when circumstances will allow it Holy Mother the Church is very desirous of the friendship among families it brings about. This is not to say that she approves of each and every individual interracial marriage. It means that it cannot be concluded without qualification from the insistence of the Church on the essential unity of all men and their essential equality that she is positively advocating interracial mixture by marriage as the ultimate to be desired in social relations. Her insistence on her appreciation of ethnic differences as well as individual differences argues against attributing to her a desire for this unqualified mixture on a universal scale. It can certainly be concluded, however, from the

9 Pope Pius XI, Encyclical *Mit brennender Sorge, A.A.S.*, XXIX (April 10, 1937), 145-167; English translation Husslein, II, 324.

general teaching of the Church on ethnic and racial groups and their mingling through marriage that the Church does not disapprove.

Catholic Teaching Specifically on Interracial Marriage

A careful search has failed to reveal any official documents of the Church bearing specifically on the morality of interracial marriages as such.[10] This is not to say that the officials of the Church were not aware of their existence, or that in specific instances did not issue instructions which have an indirect bearing on the question. Indeed, sufficient documentary evidence has been uncovered from papal and conciliar sources to form the basis at least for ascertaining the mind of the Church on the problem.

Early Christian legislation dealing with the marriage of slaves is concerned primarily with the impediment of servile condition when the condition is unknown to the free party.[11] When such a condition existed and was unknown to the other party to the marriage, who was presumed to be free, the marriage was null.[12] This

[10] Cf. Theodor Grentrup, S.V.D., *"Die Rassenmischehen in den deutschen Kolonien," Görres-Gesellschaft zur Phlege der Wissenschaft im Katholischen Deutschland, 25 heft* (Paderborn: Schoningh, 1914), 124-29.

[11] Cf. Decretals of Pope Gregory IX, especially C. 1, X, *De Conjugio Servorum,* IV, 9 in *Corpus Juris Canonici, Editio Lipsiensis Secunda, Pars Secunda, Decretalium Collectiones* (Lipsiae: Tauchnitz, 1881); also Andres E. De Mañaricua, *El Matrimonio de los esclavos, Analecta Gregoriana,* XXIII (Rome: Gregorian University, 1940), *passim;* also F. X. Wernz, *Jus Decretalium* (Rome: Polyglot, 1904), IV, 378; also Bishop John England, "Domestic Slavery," Vol. V, *The Works of the Right Rev. John England,* Most Rev. Sebastian G. Messmer, ed. (Cleveland: A. H. Clark, 1908).

[12] Decretals of Pope Gregory IX, C. 4, X, *De Conjugio Servorum,* IV, 9, on the marriage of free and slave: "Ideoque fraternitati tua per apostolica scripta mandamus, quatenus inquiras super his diligentius veritatem et tibi constiterit, quod miles ipse ignoranter contraxit cum ancilla, ita quod, postquam intellexit conditionem ipsius, nec fato nec verbo consenserit in eandem, propter quod per cardinalem eundem ab ejus fuerit consortio separatus contrahendi cum alia liberam ipsi concedas auctoritate apostolica facultatem."

However, among themselves, slaves were always considered by Church law capable of contracting valid marriages and this, even though the

impediment of "error of condition" is an impediment which survives today in the present Code of Canon Law.[13] It was not because of their color that the ancient slaves fell under the invalidating provision of "error of condition," rather it was because married slaves could not be sure that they would not be separated or in some manner be hindered from freely rendering to each other the marriage debt.[14]

Presuming that some of the slaves in question were of a different race from the freemen — frequently they were of the same race — no more can be inferred from the silence of the early legislation on this point except that, just as today, no racial impediment to marriage existed. Because the basis of the impediment to marriage arising from "error of condition" differs essentially from the basis of modern objections to interracial marriages, *a pari* or *a fortiori* arguments deduced from the Church's attitude to the marriage of slaves and freemen applied to interracial marriages as such would

masters were unwilling, for the law provided: *"Sane juxta verbum Apostoli, prout tua discretio recognoscit, sicut in Christo Jesu neque liber, neque servus est, qui a sacramentis ecclesiae sit removendus, ita quique nec inter servos matrimonia debent ullatenus prohiberi. Et, si contradicentibus dominis et invitis contracta fuerint, nulla ratione sunt propter hoc ecclesiastico judicio dissolvenda; debita tamen et consueta servitia non minus debent propriis dominis exhiberi."* C. I, X, *de Conjugio Servorum*, IV, 9.

[13] "Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum: . . . Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta." Canon 1083, *C.I.C.*

[14] Saint Thomas in his *Commentary on the Four Books of Sentences*, explicitly states this as the reason for the impediment: "Respondeo dicendum quod in matrimonii contractu obligatur unus conjugum alteri ad debitum reddendum. Et ideo si ille qui se obligat, est impotens ad solvendum, ignorantia hujusmodi impotentiae in eo cui fit obligatio, tollit contractum. Sicut autem per impotentiam coeundi efficitur aliquis impotens ad solvendum debitum, ut omnino non possit solvere; ita per servitutem, ut libere debitum reddere non possit. Et ideo sicut impotentia coeundi ignorata impedit matrimonium, non autem si sciatur, ita conditio servitutis ignorata impedit matrimonium, non autem servitus scita." St. Thomas Aquinas, *Commentarium in IV Libros Sententiarum, IV, Dist. 36, q. 1, Art. 1. Opera Omnia* (Paris: Vivès, 1874).

not be valid arguments. Race no longer implies servitude. Nor did it necessarily imply servitude in the days when the early Church law concerned itself with the marriage of slaves. This is not to say, however, that race no longer implies an inferior social or economic status in some localities, but the latter conditions have no restrictive effect on the right one has to dispose of his body in lawful marriage.[15]

Documents from the Holy See

The most authoritative ecclesiastical sources that have a bearing on interracial marriage are Pope Gregory XIII's Constitution *Populis,* Pope Urban VIII's Constitution *Animarum saluti,* and Pope Leo XIII's Apostolic Letter *Trans oceanum.*[16]

Pope Gregory XIII's Constitution *Populis* of January 25, 1585, mentions that it frequently happens that one of a married couple is carried off from Angola, Ethiopia, Brazil, and other Indian regions, to a remote place, and is cut off from any communication with his former mate. If this captive becomes a Christian, and only with great difficulty can go or send messengers to interpellate the former mate whether he or she wants to become a Christian or

[15] "Respondeo dicendum quod jus positivum, ut dictum est, progrediatur a jure naturali. Et ideo servitus quae est de jure positivo, non potest praejudicare his quae sunt de jure naturali. Sicut autem appetitus naturae est ad conservationem individui, ita est ad conservationem speciei per generationem. Unde sicut servus non subditur domino, quin libere possit comedere, et dormire, et alia hujusmodi facere, quae ad necessitatem corporis pertinent, sine quibus natura conservari non potest; ita non subditur ei quantum ad hoc quod non possit libere matrimonium contrahere, etiam domino nesciente, aut contradicente." St. Thomas Aquinas, *op. cit.,* IV, Dist. 36, Q. 1, a. 2.

[16] Pope Gregory XIII, Constitution *Populis,* January 25, 1585, Document VIII in *C.I.C.*

Pope Urban VIII, Constitution *Animarum saluti,* September 15, 1629, in *Jus Pontificium de Propaganda Fide* (Romae: Polyglot, 1888), Pars I, I, 111-14.

Pope Leo XIII, Apostolic Letter *Trans oceanum,* April 18, 1897, A.A.S., XXIX, 659-63.

Also *Authentica declaratio, quoad significationem denominationis Indorum et Nigritorum in Litteris "Trans oceanum," A.S.S.,* XXX (March 24, 1898), 698 f.

will at least live peaceably with him as a Christian, the proper ecclesiastical authorities can allow the convert to marry *any* Catholic without the interpellations.[17] The pertinence of this Constitution to interracial marriage is the non-restrictive use of the phrase "any Catholic whom they may choose" *(quovis fideli")*.[18] This means that as far as the Church is concerned, they may marry any Catholic of any race whom they may choose, providing, of course, that all other conditions are fulfilled. The document mentions specifically the natives of Angola, Ethiopia, and Brazil, who would be Negroes and Indians. It lays down the conditions for permitting the convert to marry anyone of the faithful; it makes no restriction regarding race. This is clearly a recognition of racial

[17] "Quoniam igitur saepe contingit multos utriusque sed praecipue virilis sexus infideles, post contracta gentili ritu matrimonia, ex Angola, Aethiopia, Brasilia, et aliis Indicis regionibus, ab hostibus captos, a patriis finibus et propriis coniugibus in remotissimas regiones exterminari, adeo ut tam ipsi, captivique qui in patria remanent, si postea ad fidem convertantur, coniuges infideles tam longo locorum intervallo disiunctos, an sine contumelia Creatoris secum cohabitare velint, ut par est, monere nequeant, vel quia interdum ad hostiles et barbaras provincias ne nuntiis quidem addessus pateat, vel quia ignorent prorsus in quas regiones fuerint transvecti, vel quia itineris longitudo magnam afferat difficultatem: idcirco Nos, attendentes hujusmodi connubia inter infideles contracta, vera quidem, non tamen adeo rata censeri, ut necessitate suadente dissolvi non possint, talium gentium infirmitatem paterna pietate miserati, universi et singulis dictorum locorum ordinariis et parochis, et presbyteris Societatis Jesu ad confessiones audiendas ab ejusdem Societatis Superioribus approbatis et ad dictas regiones pro tempore missis vel in illis admissis, plenam auctoritate apostolica, tenore praesentium, concedimus facultatem dispensandi cum quibuscumque utriusque sexus Christifidelibus incolis dictarum regionum et serius ad fidem conversis qui ante baptisma susceptum matrimonium contraxerunt, ut eorum quilibet, superstite conjuge infideli, et ejus consensu minime requisita, aut responso non expectato matrimonia cum quovis fideli alterius etiam ritus contrahere et in facie Ecclesiae solemnizare, et in eis postea carnali copula consummatis quoad vixerint remanere licite valeant." Pope Gregory XIII, *Populis,* Doc. VIII, *C.I.C.*

[18] "Whenever one of these three conditions is fulfilled in the case of a convert, the ecclesiastical persons mentioned in the Brief may grant a dispensation from both the interpellations and allow the convert to marry any Catholic woman whom he may choose." Francis F. Woods, *The Constitutions of Canon 1125 and their application in the United States* (Milwaukee: Bruce, 1935), p. 97.

differences and an instance of the Church's implicit insistence on the absence of any impediment of racial difference within her fold.[19]

The Constitution of Pope Urban VIII of September 15, 1629, *Animarum saluti,* "On the Privileges of Neophytes," offers a similar argument.[20] This Constitution grants an extension of certain privileges and faculties concerning marriage for India and other mission territories. Its provisions were meant to benefit neophytes in these sections. The marriage faculties concerned the granting of dispensations for certain grades of consanguinity and affinity. It lists among those who are to be accorded the privileges, Ethiopians, natives of Angola and other regions "beyond the sea" who were baptized in infancy and whose parentage was either native or part-native and part-European. Here again, no exception is taken to the fact that races have mixed in marriage. If it were sinful in itself the Church would be bound to renounce it. This has not been done. At least it can be concluded from the silence of the Church over the centuries that entrance upon an interracial marriage as such is a morally irreproachable act.

Pope Leo XIII's letter *Trans oceanum* of April 18, 1897, granted to the Negroes and Indians of Latin America, among other privileges, the permission to marry within the third and fourth degrees of affinity and consanguinity.[21] Some question was raised

[19] Pope Pius XI, *Mit brennender Sorge, op. cit., passim;* Grentrup, *op. cit.,* pp. 124-29.

[20] ". . . idcirco tenore earumdum praesentium decernimus et declaramus omnes oriundos seu naturales supradictarum omnium tam orientalium quam occidentalium partium, imo etiamsi Aethiopes, Angulani vel quarumvis aliarum transmarinarum regionum, etiamsi christianorum filii et in infantia baptizati vel etiam inter se vel cum europaeis mixtim progeniti sint, ad concessionis hujusmodi effectum esse et intellegi debere neophytos." Constitution of Urban VIII, September 15, 1629, *Animarum saluti, op. cit.,* p. 114. On the application of this Constitution to the present problem see Theodor Grentrup, *"Die Rassenmischehen in den deutschen Kolonien und das kanonische Recht."*

[21] Pope Leo XIII in the Apostolic Letter *Trans oceanum,* April 18, 1897, conceded the following for thirty years: "Ut Indi et Nigritate intra tertium et quartum tam consanguinitatis quam affinitatis gradum matrimonia contrahere possint." *A.S.S.,* XXIX, 699.

at a later date concerning the meaning of the terms *Negro* and *Indian*. In an authentic declaration from the Congregation of Extraordinary Affairs the meaning of these terms as used in the letter was fixed.[22] By Indian and Negro, Pope Leo meant not only full-blooded Indians and Negroes, but also the offspring of mixed Indian or Negro and European parentage — in other words, mestizos and mulattoes. He did not mean those who had only one-quarter Negro or Indian blood. Although the right or wrong of interracial marriage is not the point in question in these documents, nevertheless, it can be concluded that marriage between mulattoes or mestizos and full-bloods was permitted at least implicitly. This is seen from a consideration of their privilege of marrying within the third and fourth degrees of affinity and consanguinity. The Church, therefore, considers this type of marriage as such morally unobjectionable.

Particular Councils and Interracial Marriage

Only the Apostolic See can establish impediments to marriage

[22] Sacred Congregation of Extraordinary Affairs, authentic declaration of the meaning of the terms Indian and Negro in the Apostolic Letter *Trans oceanum,* 24 May 1898: "In praedictis Litteris Apostolicis *'Trans oceanum'* nomina Indorum et Nigritarum eadem significatione sumi ac in coeteris praecidentibus Constitutionibus pontificiis de hac materia agentibus, speciatim in Constitutionibus Alex. VIII *'Animarum saluti'* die 30 Martii 1690 et Ben. XIV 'Cum venerabilis,' Diei 27 Jan. 1757, videlicet:

"I. Sub nomine Indorum et Nigritorum, praeter ipsos Indos et Nigritas, comprehendi etiam eos, qui ex Indo aut Nigrita et ex muliere Europaea (vel europaei sanguinis) nec non qui ex Europaeo viro et Indica vel Nigrita mulieri, sunt progeniti, ideoque Mixti Mestitii vel mulati vocantur, et absolutam medietatem sanguinis Europaei habent. Non autem comprehendi eos, qui originem ab India vel Nigritis ducunt per avum tantum vel aviam, quique quarterones dicuntur, utpote quartam solummodo partem sanguinis indici vel nigritici habentes; et multo minus qui per proavum, vel proaviam dumtaxat, ab Indis vel Nigritis originem trahunt, et vulgo Puchueles seu Pucuelles appellantur.

II. Insuper, Indorum et Nigritarum nomine intelligi etiam Africanos, Asiaticos, et Oceanos, dummodo ex europaeo sanguine non sint, ac in America Latina commorentur, quamvis in ea nati non fuerint." *A.S.S.*, XXX, 698 f.

for the baptized.[23] The Universal Church, however, places no obstacle to interracial marriage. It may not be argued that since this has been mainly a local problem it would be left to the local Church authorities to legislate upon it. On the contrary, it must be denied that the Apostolic See would be indifferent to major moral problems in any given locality. For the sake of completeness, nevertheless, an effort was made to locate legislation on interracial marriage in the American particular councils. All three Plenary Councils of Baltimore were consulted, and the First Plenary Council of Latin America, the first four Provincial Councils of Mexico, the first four Provincial Councils of Quito, and the Archdiocesan Synod of Santiago in Cuba of 1680 were searched through for legislation on this subject. These were chosen because they represent localities where the mixture of races has existed on a large scale.

The First Plenary Council of Baltimore (1852) has nothing concerning interracial marriage in its sections dealing with marriage.[24] The Second Plenary Council of Baltimore (1866) likewise has no decrees forbidding it, nor is it mentioned at all.[25] And this, despite the fact that it devotes a special chapter to express its solicitude for the spiritual welfare of the Negroes.[26] Although it expresses its satisfaction at the erection of churches specifically for Negroes, nevertheless it would rather invite them to attend church in the buildings already existing where they may mix with other Catholics *if circumstances would permit it*.[27] This is a pertinent

[23] Canon 1038, §2, *C.I.C.*: "Eidem supremae auctoritati privative jus est alia impedimenta matrimonium impedientia vel dirimentia pro baptizatis constituendi per modum legis sive universalis sive particularis."

[24] *Concilium Plenarium Totius Americae Septentrionalis Foederatae*, Baltimore, 1852 (Baltimore: Murphy, 1853), *passim*.

[25] *Concilii Plenarii Baltimorensis II Decreta* (Baltimore: Murphy, 1868), *Titulus V, Caput IX, De Matrimonio*.

[26] *Ibid., De Nigrorum Salute Procuranda*.

[27] "At vero diu collatis, ut rei magnitudo postulabat, consiliis, id certum omnino videtur, non uno eodemque modo in omnibus nostris diocesibus agi hac in re posse. Aliter enim alii homines judicia ferunt; alia aliis in locis sunt rerum adjuncta aliae difficultates quae erunt superandae, alia media quae forte praesto erunt. Vix igitur et ne vix quidem, in tanta regionum

digression also because it is an indication of the Council's concern for the equality the Negro should enjoy with his white brethren in the House of the Lord.

The Third Plenary Council of Baltimore (1884) says nothing of interracial marriage.[28] It insists that there is to be no discrimination in the administration of the Sacraments to Negroes.[29] A review of these three Plenary Councils of Baltimore reveals no legislation forbidding interracial marriage. In the light of this it can be concluded that it is not and has not been forbidden by the Catholic Church in the United States.

The *Acts and Decrees* of the First Plenary Council of Latin America (held in Rome in 1899), Title V, Chapter VIII, *de Matrimonio,* contains no mention of interracial marriage.[30] The First and Second Councils of Mexico, held in 1555 and 1565, likewise maintained an official silence on the question.[31] The Third Council of Mexico, 1585, Book IV, Title I, orders that Indians are

amplitudine et diversitate regula generalis statui potest. Unde melius videtur si Ordinariorum zelo ac prudentiae decernendum relinquatur, quid in diversis locis bonum Nigrorum sit agendum. Si itaque, omnibus bene perpensis, Ordinario in Domino videatur saluti Nigrorum profuturum, ut ecclesiae separatae pro ipsis construantur, omnino laudandus erit, qui hoc opus, debita cum licentia, fuerit aggressus. Si vero alibi consultius judicabitur Nigros potius invitare ad ecclesias jam erectas simul cum aliis frequentandas, curet Ordinarius id ea fieri ratione, ut amplius nulli accusationi vel accusationis praetextui Ecclesia subjiciatur. Hoc enim graviter onerat conscientiam nostram ut omni ad Christum accedere volenti pateat aditus; omnibus petentibus praesto sint, qui sacramenta ministrent; ac festis Missae tremendo sacrificio adstare possint." *Ibid.,* par. 485.

[28] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii* (Baltimore: Murphy, 1886), *Titulus IV, Caput II, De Matrimonii Sacramento.*

[29] "Aliis autem in locis volumus ut non solum opportunus et idoneus locus in ecclesia communi provideatur, ac petentibus illis, nullo habito discrimine, sacramenta alacriter ministrentur; . . ." *Ibid.,* par. 238.

[30] *Acta et Decreta Concilii Plenarii Americae Latinae in Urbe Celebrati* (Romae: Vatican, 1900), *loc. cit.*

[31] *Concilios Provinciales Primero, y Segundo, celebrados en . . . la ciudad de Mexico, . . . 1555, y 1565 . . . D. Francisco Antonio Lorenzana* (Tiburcio: de Hogal, 1769).

to be given the same nuptial blessing as Spaniards.[32] In the same place it is forbidden that Indians be forced into marriage, under pain of excommunication for the one who forces them.[33] It also forbids that married slaves be separated.[34] Here the Church in Mexico is insisting on the same rights for the indigenous Indians as for the Spaniards. The Fourth Council of Mexico (1771) repeats the Third Council on the nuptial blessing for the Indians and again insists on their freedom to marry.[35] In neither the Third nor the Fourth Mexican Council is interracial marriage forbidden.

The four Provincial Councils of Quito (1863, 1869, 1873, 1885) do not mention interracial marriage.[36] The Archdiocesan Synod of 1680 of Santiago in Cuba speaks at length on the freedom of slaves to marry and their right to cohabit.[37] It lists no prohibitions of marriage between races. From the documents enumerated it is seen that the Church verifies in her legislation the doctrine of the essential unity of the human race and the essential equality of all men. It is known from the practice of the Church in regions where interracial mixture is widespread that her official position is one permitting the practice, i.e., she puts no barrier to it.[38] This is an argument from silence.

[32] *Concilium Mexicanum Provinciale III,* Mexico, 1585, printed at the order of Francisco Antonio Lorenzana, Archbishop of Mexico (Mexico: Joseph Anthony de Hogal, 1770), *loc. cit.*

[33] "Indi ad matrimonium contrahendum non cogantur, sub poena excommunicationis." *Ibid.,* par. 8.

[34] *Ibid.,* par. 9.

[35] *Concilio Provincial Mexicano IV,* Mexico, 1771 (Queretado: Escuela de Artes, 1898), *Libro IV, Titulo I, De los Esponsales y Matrimonio.*

[36] *Concilium Provinciale Primum Quitense Habitum in Sancta Ecclesia Metropolitana Quitensi, 1863* (Quito: Joannis Campuzani, 1869).

Acta et Decreta Secundi Concilii Provincialis Quitensis, 1869 (Rome: Salviucci, 1871).

Acta et Decreta Concilii Provincialis Quitensis III, 1873 (Quito, 1886).

Decretos del IV Concilio Provincial Quitense, 1885 (Quito: Clero, 1890).

[37] *Sinodo Diocesana* (Archdiocese of Santiago in Cuba Synod, 1680), reprinted by order of the second Archbishop of Habana, Juan José Diaz de Espada y Landa (Habana, 1844), *Libro Cuarto, Titulus Primus, De Sponsalibus y Matrimoniis.*

[38] Cf. Donald Pierson, *Negroes in Brazil* (Chicago: University of Chi-

The present Code of Canon Law sets up no impediment to marriage on the basis of race. On the contrary, Canon 1035 of the Code guarantees to all her subjects the right to contract marriage unless they are forbidden by law.[39] Since all rights are to be allowed freedom of action unless they conflict with the common good in the same order or with the rights of other persons, it cannot be presumed that interracial marriage is contrary to the common good or to the rights of other persons, but must be proved.[40] The absence of any prohibition of interracial marriage by the Church forestalls such a presumption. Here, the right to marry interracially is in possession and will not yield except to the demands of the common good or to the superior claim of the rights of others.

A statement from *L'Osservatore Romano,* 14-15 November, 1938, is herewith given because it has a direct bearing on the type of legislation that will be discussed later and gives an unofficial but somewhat authoritative Catholic view on interracial marriages in general:

> The Decree Law approved by the Council of Ministers in the session of Nov. 10 prohibits and declares null any and whatsoever marriage between Italian citizens of Aryan race and persons belonging to other races. No exception is admitted, nor is any dispensation foreseen. Thus the contrast between

cago Press, 1942), p. 143; Romanzo Adams, "The Unorthodox Race Doctrine of Hawaii" in *Race and Culture Contacts,* E. B. Reuter, editor (New York: McGraw-Hill, 1934), p. 146; Theodor Grentrup, *op. cit., supra,* n. 10.

In 1854 Archbishop Anthony Claret of Habana, Cuba, protested to the Governor about the prohibitions that local officials had set up against interracial marriages. May 22, 1854, the Marques de la Pezuela decreed that the laws of the island were to be followed strictly with no added prohibitions. Blessed Claret's successful protest is described in *El Beato Padre Antonio Maria Claret, Historia documentada de su vida y empresas,* by Cristobal Fernandez, C.M.F. (2 vols.; Madrid: Editorial Coculsa, 1941), I, 780-801.

[39] Canon 1035, *C.I.C.:* "Omnes possunt matrimonium contrahere, qui jure non prohibentur."

[40] ". . . suam utrique facultatem agendi cum libertate permittere aequum est, quantum incolumi bono communi et sine cujusquam injuria potest." Pope Leo XIII, *Rerum novarum, A.S.S.,* XXIII, 657 f.

the very recent Italian law and Canon Law is evident; this contrast is not so clearly in view when there are in question marriages already barred by the impediment, that is, the prohibition of the Church which, as has been said, rarely permits a Catholic to marry an unbaptized person or a baptized non-Catholic.

However, the case is very different when two Catholics of different races are concerned. It is true that the Church, ever a loving Mother, customarily dissuades her children from contracting marriages which may involve the danger of putting the offspring at a disadvantage and in this sense she is disposed to support, within the limits of the divine law, the dispositions of the civil authority tending toward the attainment of such a worthy end. The moral and social reasons for such an attitude are evident. *But the Church suggests, admonishes, persuades; she does not impose or forbid* (Italics added). When two Catholics of diverse races have decided to contract marriage and present themselves to her, free from any canonical impediments, the Church cannot, just by reason of the diversity of race, deny her [official] assistance. This is demanded by her sanctifying mission and by those rights which God has given and the Church recognizes for all her children without distinction. Thus, on this point, a general and absolute prohibition of marriage is in opposition to the doctrine and laws of the Church.[41]

[41] *L'Osservatore Romano,* numero 265 (14-15 novembre 1938): Il Decreto Legge approvato dal Consiglio dei ministri nella seduta del 10 corrente proibisce e dichira nullo ogni e qualsiasi matrimonio tra cittadini italiani di razza ariana e persone appartenenti ad altre razze. Non è ammessa nessuna eccezione; non è prevista alcuna dispensa. Sicchè il contrasto tra la recentissima legge italiana e la legge canonica è evidente. Contrasto che si verifica più difficilmente quando si tratti di matrimoni già colpiti dall' impedimento, cioè dalla proibizione della Chiesa, la quale, come si è detto, raramente permette a un cattolico di unirsi in matrimonio con persona non battezzata o con persona battezzata, ma non cattolica.

Ben diverso è invece il caso, qualora si tratti di due cattolici di diversa razza. E vero che la Chiesa, sempre madre amorosa, suole sconsigliare ai suoi figli di contrarre nozze che presentino il pericolo di prole minorata ed in questo senso è disposta ad appoggiare, nei limiti del diritto divine, gli sforzi dell' autorità civile tendenti al raggiungimento di tale onestissimo scopo. Sono evidenti le ragioni morali e sociali di tale attegiamento. Ma la Chiesa suggerisce, ammonisce, persuade; non impone o proibisce. Quando due fedeli di razza diversa, decisi a contrar matrimonio, si presentano a

This is not presented as an official document of the Church. However, it has high authoritative standing because it is printed in the approved newspaper of Vatican City. The occasion was the passing of anti-miscegenation laws by the Italian Government in 1938. *L'Osservatore Romano* protested these laws in very general terms and reiterated what has been indicated from other Church sources, namely, there is not and cannot be any Church impediment to marriage based on mere difference of race.

The Natural Right of the Individual to Marry Interracially

All men have a natural right to marry. "No human law can abolish the *natural and original right of marriage,* nor in any way limit the chief and principal purpose of marriage ordained by God's authority from the beginning: 'Increase and multiply.' " [42] This natural right to marry was urged again by Pope Pius XI in his condemnation of certain pernicious eugenic practices which encroached upon *"the natural right of man to enter matrimony. . . ."* [43]

Marriage is a natural right that is in the same class of rights as the right to enjoy personal freedom and the right to food and clothing. As rights, they are not ends in themselves, but are means to human welfare. With respect to marriage, it is easily seen that membership in the conjugal union is an indispensable means to reasonable life and self-development for the majority of persons. There are no conceivable substitutes for marriage except free-love

Lei, liberi da ogni impedimento canonico, la Chiesa, non può, per il solo fatto della diversità di razza, negare la sua assistenza. Lo esige la sua missione sanctificatrice; lo esigono quei diritti che Dio ha dato e la Chiesa riconosce indistintamente a tutti i suoi figli. Sicchè, su questo punto, una proibizione generale assoluta di matrimonio è in opposizione alla dottrina e alle leggi della Chiesa.

[42] "Jus conjugii naturale et primogenum homine adimere causamve nuptiarum praecipuam, Dei auctoritate initio constitutam, quoque modo circumscribere lex hominum nulla potest: 'Crescite et multiplicamini.' " Pope Pius XI, *Casti connubii, A.A.S.,* XXII, 542.

[43] "Reprobetur denique oportet perniciosus usus, qui proxime quidem naturale hominis jus ad matrimonium ineundum spectat, . . ." *Ibid.,* XXII, 542.

and celibacy. The first is not adequate for any person for it is a violation of the natural law and the second is suitable only for a minority. *Directly and "per se,"* therefore, marriage is necessary for the majority of people; and for the majority it is an *individual* necessity. For this reason, if the State were to abolish marriage it would take away from the majority an indispensable means of right and reasonable life. Consequently the majority have a *direct* natural right to the legal access to marriage.[44]

Baptized or unbaptized, man has this right by nature. Since the mission of the State is not to deprive man of natural rights which antecede the State itself, but rather to facilitate the normal exercise of these rights, the State usurps competence if it directly abolishes the right to marry. This right, therefore, is a right which the individual possesses independently of the State. Moreover, what natural law guarantees for all men, the law of the Church expressly safeguards for her baptized subjects: "All persons can contract marriage unless forbidden by law." [45] This reaffirms the natural right all men have to contract marriage. It presumes that all the conditions are present to perform the act validly, e.g., possession of the physical and mental capability, freedom from a previous valid bond, and the presumption that the persons have not renounced the right to marry by solemn vows or sacred orders. The prohibition of interracial marriage by law will be the subject of Chapter IV.

As far as nature is concerned, the right to marry interracially is a corollary of man's natural right to marry. Nature finds no repugnance in the notion. Men regarded in any of the accepted notions of race, are interfertile. What is more, the hybrid is interfertile with the parent races and with all other races.[46] Nature has

[44] Cf. Msgr. John A. Ryan, *Distributive Justice* (3rd ed.; New York: Macmillan, 1942), p. 46.

[45] Canon 1035, *C.I.C.*

[46] "But the interfertility of the members of all races with one another, coupled with the unimpaired fertility of their hybrids, is precisely the definitive mark of mankind." Joseph T. Delos, "The Rights of Man *vis-à-vis* of the State and the Race," *Race: Nation: Person: a Symposium,* Joseph Corrigan and J. Barry O'Toole, editors (New York: Barnes and Noble, 1944), p. 58.

set up no barrier to interracial marriages so far as the primary end of marriage is concerned, that is, the procreation and education of children. *Per se* nature has set up no barriers to the secondary purpose of marriage, namely, to community of life. Difference of race, in itself, is not an insurmountable obstacle to living together in peace and harmony and mutual help.[47] It may become a formidable obstacle when positive law and social usage emphasize the difference. But this is accidental to difference in race which in itself is no hindrance to happy married life. The effect that positive law and custom have upon the advisability of entering upon a mixed-race marriage will be discussed later.

Nature sets up no barrier to interracial marriage; neither does the Church. Nowhere in the present Code of Canon Law does an impediment of mixed-race appear. Canon 1035 of the Code states that all have the right to marry who are not forbidden by law. Further, it is a principle of positive law that what is not forbidden is allowed.[48] Therefore, should two of the Church's subjects desire such a marriage, all other conditions having been fulfilled, they are not to be denied the sacraments.[49] The restriction that civil law might place on this natural right to marry will be discussed in Chapter IV.

In the only careful study of the fecundity of mulattoes, Frazier finds that it is about the same as that of full-blooded Negroes. E. Franklin Frazier, "Children in Black and Mulatto Families," *The American Journal of Sociology,* XXXIX (July, 1933), 12-29; Carlton Stevens Coon, *The Races of Europe* (New York: Macmillan, 1939), p. 3.

[47] Cf. Donald Pierson, *op. cit.,* pp. 147 f., 155.

[48] For an application of this principle see the Decretals of Gregory IX, C. 23, X, "De Sponsalibus et Matrimonio," IV, 1.

[49] "In nonnullis statibus matrimonia inter homines albi et eos qui nigri sunt coloris lege prohibentur, et irrita habentur. Sed lege Ecclesiae valent, ubicumque non occurrat servilis conditionis impedimentum. Si contingat aliquod iniri nequeunt prohiberi sacramentis ob legis vetitum, vel publicam opinionem; nam utuntur jure naturae, Ecclesia haud prohibente." Francis P. Kenrick, *Theologia Moralis* (Philadelphia: Cummiskey, 1843), III, 334, n. 142.

The Natural Right to Marry the Person of One's Own Choice

The right to marry interracially may also be considered from the standpoint of the right to marry according to one's own choice. All men have the right to marry. But marriage is a contract by which a man and a woman mutually confer and accept the perpetual and exclusive right to the use of each other's body for the purpose of performing acts which are in themselves suitable for the begetting of children.[50] To determine freely one person as a marriage partner to the exclusion of all others is what is known as freedom of choice. From the very nature of the marriage contract this is necessary if the parties concerned are to be held responsible for fulfilling the burdens of marriage. Hence, the right to marry includes the right to choose freely a marriage partner both positively and negatively by excluding all others.

The matter of the contract must be determined in such wise that the rights conferred belong to this particular person and to no one else. There is only one way in which this can happen, that is, through the free choice of the parties themselves. The concession of rights over one's body for the performance of conjugal acts belongs exclusively to the individual person.[51] For this reason, too, as long as the selection is in accord with the Divine Positive and Natural Laws and the law binding the subjects of the Church, it demands unimpeded freedom.[52] What is more, as minister of the Sacrament of Matrimony, the contracting parties must have an intention, at least implicit, to confer the sacrament on each other to the exclusion of all others. No other human power can supply this necessary element of the marital consent except the parties themselves.[53]

[50] Cf. Al. De Smet, *Tractatus Theologico-Canonicus de Sponsalibus et Matrimonio* (4th ed.; Brugis: Beyaert, 1927), nn. 75-6.

[51] *Ibid.*

[52] *C.I.C.*, Canon 1081, 1: "Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus; qui nulla humana potestate suppleri valet. 2. Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum in ordine ad actus per se aptos ad prolis generationem."

[53] Cf. Franciscus Suarez, *De Sacramentis in genere*, q. 64, a. 10, sect. 3, n. 11, in *Opera Omnia*, XX, 255.

That the concession of rights over one's body for the performance of conjugal acts belongs exclusively to the individual person follows from several other considerations: — first, there is no obligation on the individual as such to contract marriage; second, the nature of the power a person has over his body demands freedom of choice; third, the state of marriage involves the disposition of the whole life of the individual in addition to the relinquishing of rights over his body to another; fourth, equity demands that the burdens of marriage should be freely accepted; fifth, Holy Mother the Church has always safeguarded this right to marry the person of one's own choice as long as the choice did not violate the laws of God or of the Church.

Although marriage has for its purpose the begetting of children to insure the continuance of the human race, nevertheless, the continuance of the human race does not demand that all men marry.[54] The fact that there is no obligation to marry incumbent upon the single individual leaves him free to decide for himself whether he wants to marry or not. Further, the individual has full rights over the use of his various faculties as means he is to use to attain his perfection.[55] This includes the right to use his generative faculties in a way that is conformable to his rational nature and the Divine Law, namely, as a rational agent, freely. The individual is independent of all other men with respect to the use of the means to attain his ultimate end.[56]

In the choice of a state of life, especially when it involves the relationship of the individual to his ultimate end, God, the individual must be allowed full freedom to act in accord with the

[54] Cf. John A. Ryan, *Distributive Justice*, p. 46.

[55] Cf. Aloysius Sabetti - Timotheus Barrett, *Compendium Theologiae Moralis* (3rd ed.; New York: Pustet, 1924), p. 348, n. 352.

[56] Saint Thomas Aquinas, *Summa Theologica*, II, II ae., q. 104, a. 5: "Tenetur autem homo homini obedire in his quae exterius per corpus sunt agenda; in quibus tamen secundum ea quae ad naturam corporis pertinent, homini obedire non tenetur, sed solum Deo; quia omnes homines natura sunt pares; puta in his quae pertinent ad corporis sustentationem et prolis generationem. Unde non tenentur nec servi dominis, nec filii parentibus obedire de matrimonio contrahendo, vel virginitate servanda, aut aliquo alio hujusmodi."

Divine Positive and Natural Law.[57] Marriage is such a state because it is a means that the individual may use to perfect himself and involves the whole course of his life and its ordination to God. Man must have freedom in this choice because it is his individual responsibility to act according to his rational nature and the Divine Law. Since no one else can accept his responsibility, no one else has the right to interfere in his reasonable choice. A choice manifestly contrary to reason, to the Divine Law, or ecclesiastical laws binding subjects of the Church, of course, cannot claim the same respect.

This freedom to marry the person of one's own choice is clear from the following passage from Saint Paul's First Epistle to the Corinthians, chapter vii, verse 39:

> A woman is bound as long as her husband is alive, but if her husband dies, she is free. *Let her marry whom she pleases,* only let it be in the Lord.

In writing of the liberty that man enjoys in entering upon marriage, Pope Pius XI declared:

> This freedom, however, regards only the question whether the contracting parties really wish to enter upon matrimony and *to marry this particular person.*[58]

The late Holy Father has listed here the *freedom to marry this particular person* and, it is understood, to have children by this particular person as a freedom of the same rank as the freedom to marry or not. Its importance as a human right, therefore, is not to be underestimated.

When an individual enters upon marriage he accepts grave responsibilities. He binds himself for life to these obligations.

[57] The fundamental reason for this is the obligation that man has to attain his ultimate end; the transcendency of this obligation is expressed succinctly by Jacques Maritain, *The Person and the Common Good,* John J. Fitzgerald tr. (New York: Scribner's, 1947), p. 5: "The human person is ordained directly to God as to its absolute end. Its direct ordination to God transcends every created common good — both the common good of the political society and the intrinsic common good of the universe."

[58] "Haec tamen libertas eo tantum spectat ut constet, utrum contrahentes re vera matrimonium inire et cum hac persona inire velint an non." Encyclical, *Casti connubii, A.A.S.,* XXII, 541.

Consequently, justice demands that he be allowed freedom of choice in such a matter.[59] The very nature of the contract demands that the mutual exchange of rights and obligations be freely undertaken. Holy Mother the Church has always protected this freedom of choice as long as it was in accord with reason and the Divine Law. For instance, the Code of Canon Law invalidates marriages where there has been an error amounting to the very identity of the intended spouse. At the same time she does not invalidate the marriage of a free person to a slave when the condition of servitude is known to the free party.[60] Although she is anxious that the marriage of minors be not entered upon against the wishes of the parents, nevertheless, she does not hold these marriages invalid or necessarily illicit.[61] She insists that no human power can supply the consent necessary to establish the marriage contract if true consent of the parties is not present.[62] That this consent must be free is clear from her holding marriages entered upon under the duress of force or fear as invalid.[63] Freedom, therefore, is an essential property of the consent required to establish the marriage contract.

[59] Saint Thomas Aquinas, *Supplementum*, q. 47, a. 6: "Utrum aliquis praecepto patris possit compelli ad matrimonium contrahendum. Respondeo dicendum quod cum in matrimonio sit quasi quaedam servitus perpetua, pater non potest cogere filium ad matrimonium per praeceptum, cum sit liberae conditionis; sed potest eum inducere ex rationabili causa; et tunc sicut se habet filius ad causam illam, ita se habet ad praeceptum patris; ut scilicet si causa illa cogat de necessitate, vel de honestate, et praeceptum patris similiter cogat; alias non."

[60] *C.I.C.*, Canon 1083: "1. Error circa personam invalidum reddit matrimonium. 2. Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum: 1°. Si error qualitatis redundet in errorem personae; 2°. Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta."

[61] *C.I.C.*, Canon 1034, "Parochus graviter filiosfamilias minores hortetur ne nuptias ineant, insciis aut rationabiliter invitis parentibus; quod si abnuerint, eorum matrimonio ne assistat, nisi consulto prius loci Ordinario."

[62] Cf. *C.I.C.*, Canon 1081.

[63] *C.I.C.*, Canon 1087, §1, "Invalidum quoque est matrimonium initum ob vim vel metum gravem ab extrinseco et iniuste incussum, a quo ut quis se liberet, eligere cogatur matrimonium."

This right includes both a positive and a negative aspect. No person is to be forced into a marriage, neither is he to be impeded from entering upon marriage with the person of his choice as long as the laws of God and of the Church are not violated.[64] To impede unjustly the marriage of a person with another person of his own choice is to violate a right that this person has to make the proper disposition of his whole life according to the dictate of his reason and in conformity with the Divine and Natural Laws. It has not been proved that one's choice of a person of another race as a marriage partner as such violates ecclesiastical, Divine Positive or Natural Law. Hence, this choice seems to stand as consonant with the right one has to marry a person of one's own choice.

There are certain obvious limits to this freedom of choice. One example of this is the marriage of a father to his daughter. Such a marriage is forbidden by the law of nature and the law of the Church. Although the continuation of the race through the begetting of offspring would not be entirely obviated, nevertheless there is some danger that defective offspring would result; the reverence due to parents is compromised by the use of the marital act; purity of morals within the family is imperiled; the beneficial effect that marriage has of multiplying friendships among the in-laws is lost; passion is more difficult to moderate because to the natural love one has for one's blood relatives is added marital love.[65] Such a marriage is repugnant to the moral sense of all decent men. There are good reasons, therefore, for limiting the freedom of choice when such marriages result from unbridled liberty. In certain

[64] St. Alphonsus Maria De Liguori, *Theologia Moralis,* Lib. VI, Tract. de Matrimonio, Cap. i, de Sponsalibus, dub. 2 (Ed. nova; Romae: Vaticanis, 1905), IV, n. 849: "Certum est matrimonia filiorumfamilias contracta sine consensu parentum esse valida . . ." Commenting on Saint Thomas' *Summa Theologica,* II, IIae, q. 104, a. 5, St. Alphonsus writes: "Et licet S. Doctor ibi non loquatur de filio contrahente sine consensu patris, sed de patre cogente filium ad matrimonium; ratio tamen quam ibi praemittit est generalis et pro utroque casu concludit, dum dicit: *Tenetur autem homo homini.* . . ."

[65] Cf. De Smet, *op. cit.,* n. 606.

other cases where good reasons for limiting this right exist, the right of freedom of choice may be limited. The competent authority to do this for the baptized is the Church exclusively. The State, as will be pointed out later, according to the more probable opinion may also do so for the unbaptized, but only for good and proportionate reasons. In the chapter of this dissertation dealing with the moral validity of the laws against interracial marriage an attempt will be made to ascertain whether the State has reasonably and justly limited the right to choose one's marriage partner.

This right to marry is not a right that is as absolute as that of life itself. Possession of life is inalienably man's own — subject only to God's dominion — and, unless the right has been forfeited, all other men must respect it. The right to marry is a right that can be limited by many considerations not necessarily legally sanctioned. For in Catholic moral theology and ordinary ethics the concept of right differs from that held by the civil jurist who may be concerned merely with legal rights and penalties. The impression is sometimes given by the legalist that there is no obligation to respect the rights of others on any other basis than the sanction of the law. Christianity has imposed further limits to rights that go beyond mere legal sanction. It has recognized a hierarchy of rights which take precedence over each other in the proper order. Thus, the right to life, good name and marriage are very urgent; God's rights are supreme; the rights of the Church, in its own sphere cannot be violated while the rights of the State within its own sphere are also supreme if they do not prejudice divine, ecclesiastical or inalienable human rights. A right, therefore, does not only imply its possession and use, but it also implies actions, omissions, and forbearances on the part of others. Some rights must be allowed untrammeled action because of their supreme position in the hierarchy of rights. Marriage is not such a right, but must be so exercised that the good of one's immortal soul be not hindered, that the rights of one's intended mate be not infringed, that the demands of life in the community be not passed over, that the valid demands of the institution of marriage be not ignored. When each one of these rights is respected by the prospective spouse, and his entrance into marriage is so governed, then he may be said

properly to be exercising his right to marry. There is no right to an act when it is exercised against the greater claims of a higher right and not in accord with one's eternal destiny. The Christian virtue which governs the proper exercise of rights so that the genuine welfare of the individual ensues is prudence. Marriage is the right of all men when it fulfills the condition required for all rights, that is, that it be prudently entered upon.[66]

At this point a very important factor must be introduced; namely, the ratio of the number of marriageable men in a racial group to the number of marriageable women — the sex-ratio of the group. If the sex-ratio of a particular racial group in a given locality deviates greatly from the sex-ratio which permits a reasonable chance for *intraracial* mating, then the right to marry interracially certainly demands the same respect as the general right to marry. For example, the early European colonists in South America and South Africa found themselves in this situation. Similarly, certain minority groups in this country labor under the same handicap.[67]

[66] Thomas Sanchez asks this question concerning a betrothal: "An possint irritari, quando timetur magnum scandalum, aut pessimus exitus, et odia, quamvis contrahentes pares sint." And replies: "Hoc tamen limitandum est, nisi scandalum magnum ex eo matrimonio probabiliter timeatur . . . quia virtus justitiae obligare nequit ad actum, qui sine peccato impleri non potest, sed contrahere matrimonium cum magno illo scandalo est aperte lethalis culpa, qua notabiliter charitas proximi laedatur, dissolvatur pietas parentum, et cognatorum amicitia. . . ." Thomas Sanchez, *Disputationum de Sancto Matrimonii Sacramento* (Genuae: Pavonem, 1602), lib. I, disp. XIV, n. 3.

[67] *The Sixteenth Census of the United States, 1940* (Washington: Government Printing Office, 1943), II, Part I, 19, gives the sex-ratio for Negroes of all age groups in the United States as 95 males per 100 females; Chinese, 285.3 males per 100 females; Japanese, 130.9; while the sex-ratio for all whites was 101.2 and for the whole United States the sex-ratio was 100.7.

As this figure is not necessarily indicative of the number of marriageable males and females a computation was made from figures given in the same source (p. 56) of the sex-ratios of the following groups for the age-group of 15 to 44 years of age inclusive: all classes in the United States in age group (15-44) totaled 31,558,313 males and 32,035,291 females, giving a sex-ratio of 98.5; native-born whites totaled 26,439,557 males and 26,609,-

Finally, abstracting from the above considerations and other circumstances, and regarding the entrance upon an interracial marriage as the exercise of a natural right, it is primarily a morally good act. This is true because morally good acts are those acts "which further the end to which rational nature tends; namely,

004 females, giving a sex-ratio of 99.3; Negroes in the same age group totaled 3,040,580 males and 3,398,345 females, giving a sex-ratio of 89.9 males per 100 females. Circumstances can be conceived of in which the Negro could be at the same serious disadvantage as the Chinese and Japanese in the matter of securing mates in the same race group.

Young, *op. cit.*, p. 353, declares a sex-ratio of 115.1 to be sufficiently abnormal to lead to the usual problems accompanying an excess of males. The situation is reversed for the Negro male in the United States, but the same moral dangers could present themselves from an excess of females.

The *1940 Census of the United States* listed a total of 77,504 Chinese in this country of whom 57,389 were male and only 20,115 female; 126,947 Japanese of whom 71,967 were male and 54,908 female. Figures from *Statistical Abstract of the United States* (Washington: Government Printing Office, 1946), p. 17.

"The proportion of the sexes constitutes one of the foundations of morality. The ethical life of a people or community is likely to be best when the sexes are about equal in number. An excess either way disturbs the socio-biological economy. An excess of males may lead to vice and immorality. It stimulates prostitution in some form. . . . An excess of females may encourage promiscuity between the sexes. It certainly deprives females of the desired home and the privilege of rearing children, may lead to the dependency of some of them, and affects the economic status of males by placing women as competitors in many occupations." John M. Gillette and James M. Reinhardt, *Problems of a Changing Social Order* (New York: American Book Co., 1942), pp. 106-8.

In 1930 in California the sex-ratio of Mexican men of marriageable age to Mexican women was 114/100. Panunzio holds this indicates no need to go outside the Mexican group to seek mates. The Japanese ratio was 138/100, which meant that about one-fifth of the males found it impossible to get Japanese mates. The sex-ratio of Negroes was 84/100. Cf. Constantine Panunzio, "Intermarriage in Los Angeles [County]," in *American Journal of Sociology*, XLVII (1941-42), 691. Against Panunzio's opinion on the Mexicans is the statement of Donald Young that a sex-ratio of 115.1 is "sufficiently abnormal to lead to the usual problems accompanying an excess of males," in *American Minority Peoples* (New York: Harper, 1932), p. 353.

the development and perfection of personality."[68] Further, natural rights are "necessary means to rational life and the development of personality."[69] Hence, natural rights find their justification and purpose in the welfare of the person. When natural rights are properly exercised, therefore, they achieve a good purpose and actually further the attainment of the general welfare. Difference of race between the contracting parties, in itself, is a morally indifferent circumstance. Hence, the exercise of the right to marry by entering upon an interracial marriage retains the primary morality of the exercise of a natural right, namely, that of a morally good act.

Interracial Marriage as Treated by Catholic Writers

Catholic theologians have written very little on the morality of a person's entering upon an interracial marriage. Those theologians who have written upon the subject are agreed that in itself the act of entering upon an interracial marriage is not an evil act. Archbishop Kenrick calls it the exercise of a natural right.[70] Although Francis J. Gilligan holds that due to extrinsic factors engendered by race prejudice such marriages between Negroes and white persons in the United States at the present time would be wrong, he points to the objective validity of such marriages properly entered upon.[71] John La Farge concurs on the inadvisability of entering upon such a marriage here and now, but also points to the absence of racial impediments in the legislation of the Church.[72] Louis J. Nau, while pointing also to the dangers accompanying such marriages, holds that Catholic parties must be allowed the use of the Sacraments.[73] In his Thomistic study of the family,

[68] John A. Ryan, *The Norm of Morality* (Washington: National Catholic Welfare Conference), p. 16.

[69] *Ibid.*, p. 55.

[70] Kenrick, *op. cit.*, III, n. 142 quoted above, n. 49.

[71] Francis J. Gilligan, *The Morality of the Color Line* (Washington: Catholic University of America Press, 1939), p. 92.

[72] John La Farge, *The Race Question and the Negro* (New York: Longmans, Green, 1945), pp. 195-8.

[73] Msgr. Louis J. Nau, *Marriage Laws of the Code of Canon Law* (New York: Pustet, 1934), p. 15.

Anthony Ostheimer treating briefly of the state prohibitions of interracial marriage and the "undesirability of miscegenation" claims that "the fact remains that such State intervention is an unjustifiable intrusion into personal natural rights."[74] Theodor Grentrup, who made extensive studies of miscegenation in the colonies settled by the European nations, concluded to the validity and licitness of interracial marriages in the eyes of the Church.[75] Monsignor John A. Ryan wrote that a Catholic white person and a Catholic Negro who are otherwise qualified have a canonical right to demand that their parish priest marry them.[76] Robert Dillon in his canonical study on *Common Law Marriage* holds that the provisions of Canon 1098 would apply to interracial marriages forbidden by civil law where subjects of the Church are involved.[77] Juan B. Ferreres wrote about certain Peruvian women who had married Chinese and Japanese in Peru and who found out later that many of these men already had contracted marriages back in China or Japan. Ferreres deplores the unfortunate situation that prevents the validation of these marriages and indicates that it is only the existence of the prior marriage bond that stands in the way of a valid and licit marriage. He makes nothing of the fact that the parties are of different races. This indicates that the practice of the Church is permissive of interracial marriages wherever the situation has arisen.[78]

The above Catholic writers, scanty though their treatment of the subject, form a body teaching with uniformity on interracial marriage involving white persons. It may be concluded on their combined authorities, on the silent consent of the Church, and on

[74] Anthony L. Ostheimer, *The Family, a Thomistic Study in Social Philosophy* (Washington: Catholic University of America Press, 1939), p. 212.

[75] Theodor Grentrup, *op. cit., passim.*

[76] Msgr. John A. Ryan, "The Black Patterns of White America," *The Negro Digest,* I (April, 1943), 29.

[77] Robert E. Dillon, *Common Law Marriage* (Washington: Catholic University of America Press, 1942), p. 53.

[78] Juan B. Ferreres, *Los Esponsales y el Matrimonio* (7th ed.; Madrid: Razón y Fe, 1927), Capitulo XIX, "Cuestiones canonico-morales de ciertos matrimonios de chinos y japoneses en el Peru," nn. 1076 f.

the fact that to enter an interracial marriage is the exercise of a natural right, that, considered in its interracial aspect and abstracting from all other circumstances, the entrance upon such a marriage in itself retains the primary morality of entering properly upon marriage in general; namely, it is a morally good act.

The Morality of Entering Upon an Interracial Marriage

There is some truth in the contention that although the family is a social unit, it is one that can function with smoothness only if the community in which it resides cooperates. Interracial marriages in this country do not seem to have this community cooperation. What, then, is to be said about the right or wrong of entering upon such a marriage?

What has been treated thus far says nothing conclusive about interracial marriages involving white persons contracted under favorable or unfavorable conditions. It is well to insist at the very beginning of this phase of the treatment of the subject that to enter upon marriage in a legitimate and valid manner is a morally good act. Difference of race of the parties adds nothing to the primary morality of entering marriage. Hence, the entrance upon an interracial marriage, even where it involves a white person under the unfavorable conditions which seem to exist, retains the morality of entrance upon marriage in general, namely, that of a morally good act. Objectively speaking and taken in itself, the mere difference of race does not vitiate the primary moral goodness because of the accidental nature of difference of race. *Per se*, therefore, the entrance upon an interracial marriage is objectively a morally good act.

Due to peculiar circumstances in the United States, however, the entrance upon an interracial marriage involving a white person seems to be a good act morally to which is attached many undesirable concomitants. The fact that these effects are not intrinsic to the act of entering upon the marriage itself, but are the result of extrinsic factors, may be further reason for holding to the objective moral goodness of entering upon an interracial marriage. Their extrinsic nature may be concluded from the treatment to be given to them below.

In forming a moral judgment of the act of entering upon an interracial marriage attention must be given to some of the circumstances that attend it. Hence, consideration will now be given to the intention of the contracting parties, the great good of exercising a natural right, the concept of Christian prudence, the sacredness of even the merely natural marriage bond, the great benefits of the sacrament, and some objections based on certain undesirable concomitants that interracial marriage in this country might involve.[79]

The entrance upon an interracial marriage is an act to which may be applied the principle of double effect in determining its moral licitness in a given case. This principle may be formulated as follows: It is morally permissible to perform an act (either of commission or omission) good or indifferent in itself from which follow a good effect and a bad effect, provided (a) that the good effect alone is intended, the bad effect though foreseen being merely permitted; (b) that the good effect follows from the act at least as immediately in the order of causality as the bad effect, and is not effected by the latter; (c) that the good resulting from the act outweighs or equals the evil. In the moral evaluation of the act of entering upon an interracial marriage which follows below, the principle of double effect will underlie the moral opinions expressed therein.[80]

The intention of the parties must be good, that is, to enter upon marriage as the prelude to a stable and lasting family life and all that is implied by the married state. This is a matter to be determined in each case. A highly improbable instance of an evil intention in this matter would be to enter such a marriage intending to stir up race hatred or to collect blackmail. Likewise, to enter upon such a marriage merely to spite family or friends would also be an evil intention. To enter upon such a marriage knowing that the civil law in certain States would easily grant a divorce when it is discovered that it is a miscegenetic marriage and intending at

[79] Benedictus H. Merkelbach, *Summa Theologiae Moralis* (3 vols.; 3rd ed.; Paris: Desclée de Brouwer, 1938), I, n. 173.

[80] Cf. Heinrich A. Rommen, *The Natural Law* (St. Louis: Herder, 1948), p. 222.

the time of marriage to seek a divorce on such grounds would be a vicious intention. Certainly to enter upon such a marriage having in mind only the expectation of extraordinary sexual experience is not a good intention. Good intentions would include the desire to contract such a marriage for the sake of its great benefits, for example, for the sake of having children, begotten from this particular person of one's own choice, for the alleviation of concupiscence, for companionship, or for the other usual legitimate reasons for contracting marriage.

To enter an interracial marriage intending the alleviation of race prejudice is a good and noble intention. There is, however, good reason to doubt the practicability of this means of diminishing prejudice. In most sections of this country it seems that it cannot be urged that the alleviation of race prejudice would be forthcoming with any practical immediacy. The fact that interracial marriage is regarded as a criminal offense in so many States seems sufficient evidence of the probability of the opposite effect in those States to doubt the immediate practicability of this reason for contracting such marriages. That it might alleviate race prejudice in other localities is probable. However, there are still means, such as religion and education, which have not yet been fully applied to the problem. The inconveniences accompanying such a marriage in the States where the race problem is more acute argue against this means of alleviating race prejudice there. It is questionable whether, even in States where race prejudice is not so open and so readily inflamed, the undesirable effects, passing over exceptional cases, may not outweigh this reason for contracting interracial marriages.[81] This is not to say, however, that the alleviation of race prejudice is not a worthy motive, for it could be a highly desirable secondary motive as long as the requirements of Christian prudence are fulfilled. As such it would add to the subjective goodness of the entrance upon the marriage itself.

[81] A perusal of the Report of the President's Committee on Civil Rights, *To Secure These Rights*, introduction by Charles E. Wilson (New York: Simon, Schuster, 1947), gives sufficient unbiased information to make this statement. Cf. also Gilligan, *op. cit.*, pp. 92 f.; Msgr. J. A. Ryan, "Black Patterns in White America," *op. cit.*, p. 29.

Marriage has its charitable aspect. Entrance upon marriage itself is, in addition to all else that is claimed for it, a great act of charity that the parties exercise upon each other. It makes accessible for each of the parties one of the means that are necessary for most people for virtuous living. There are innumerable opportunities within marriage itself for exercising charity: the mutual help that is rendered, the safeguarding of continence, the loving care heaped upon each other and the children. It is, indeed, a great school of love. This aspect of marriage may not be denied to interracial marriage. This, too, may be added to the long list of great benefits accruing to the exercise of the natural right to marry interracially.

To intend to enter upon a valid marriage is in itself an eminently good intention. It is eminently good because it proposes to bring about the great benefits entailed in the exercise of a natural right, which exercise is a morally good act itself. It proposes to secure the natural blessings of marriage and with baptized persons to gain the supernatural advantages and benefits of the sacrament. Christian prudence does not neglect the exalted value of these benefits even though there may be certain undesirable effects accidentally accompanying them. In writing of the care that the individual should exercise in the choice of a marriage partner, Pope Pius XI gave the following exhortation:

> Let them diligently pray for divine help, so that they make their choice in accordance with Christian prudence, not indeed led by the blind and unrestrained impulse of lust, nor by any desire of riches or any other base influence, but by a true and noble love and by a sincere affection for the future partner; and let them strive in their married life for those ends for which this state was constituted by God.[82]

This prudence is based upon the principles of the Christian faith and refers all things to the supernatural end, namely, to God as He is known and loved on earth and as He is to be possessed in heaven. Christian prudence, therefore, is not only concerned with

[82] Pope Pius XI, Encyclical *Casti connubii*, *A.A.S.*, XXII, 586. English translation from Husslein, *op. cit.*, II, 168.

man's destiny here on earth but with his eternal destiny.[83] In entering upon an interracial marriage when all the requirements of Christian prudence are fulfilled, the individuals concerned act without reproach.

Specifically, the proper exercise of a natural right is a good in itself, and a great good, because when properly exercised it furthers the welfare of the individual and of society. It has been indicated that the entrance upon an interracial marriage is the exercise of a natural right. Likewise, that this exercise is a morally good act. But to place a morally good act is a good, namely, a boon, in itself and when it is exercised in the attainment of the great benefits attached to marriage in the natural and supernatural orders it is a very great good. Hence, one good effect of entering upon an interracial marriage, by virtue of the marriage itself, is the very act insofar as it has attached to it such great benefits.

Among the great benefits attaching to the entrance upon all valid marriages is that of effecting a union which is a sacred thing even in the natural order. This is attested by Pope Pius XI in his Encyclical *Casti connubii:*

> Even by the light of reason alone and particularly if the ancient records of history are investigated, if the unwavering popular conscience is interrogated and the manners and institutions of all races examined, it is sufficiently obvious that there is a certain sacredness and religious character attaching even to the purely natural union of man and woman, "not something added by chance but innate, not imposed by men but involved in the nature of things," since it has "God for its author and has been even from the beginning a foreshadowing of the Incarnation of the Word of God" *(Arcanum)*. This sacredness of marriage which is intimately connected with religion and all that is holy, arises from the divine origin we have just mentioned, from its purpose which is the begetting and educating of children for God, and the binding of man and wife to God through Christian love and mutual support; and finally it arises from the very nature of wedlock, whose

[83] "Tertia autem prudentia est et vera, et perfecta, quae ad bonum finem totius vitae recte consiliatur, judicat, et praecipit; et haec sola dicitur prudentia simpliciter." Saint Thomas Aquinas, *Summa Theologica,* II, IIae, q. 47, a. 13.

> institution is to be sought for in the farseeing providence of God, whereby it is the means of transmitting life, thus making the parents the ministers, as it were, of the Divine Omnipotence. To this must be added that new element of dignity which comes from the sacrament, by which the Christian marriage is so ennobled and raised to such a level, that it appeared to the Apostle as a great mystery, honorable in every way. (Eph. v, 32; Hebr. xiii, 4)[84]

Hence, even in the natural order marriage is a great good in itself, both to the individual and to society, and is an object the desire of which seems to be sufficient motive to enter an interracial marriage when Christian prudence indicates that this is the course to follow despite certain undesirable concomitants which will be described below.

Since Christ has raised marriage for Christians to the dignity of a sacrament, certain other benefits of incomparable value have been added to marriage. First among these are the supernatural graces conferred by the sacrament and listed by Pope Pius XI in his Encyclical on Christian marriage:

> Hence this sacrament not only increases sanctifying grace, the permanent principle of the supernatural life, in those who, as the expression is, place no obstacle *(obex)* in its way, but also adds particular gifts, dispositions, seeds of grace, by elevating and perfecting the natural powers.[85]

There are other advantages and benefits of the sacrament, the desire of which, objectively speaking, constitutes a motive of such a high order as to transcend the considerations of a social nature militating against entrance upon an interracial marriage. In the words of Pope Pius XI again:

> Now when We come to explain, Venerable Brethren, what are the blessings that God has attached to true matrimony, and how great they are, there occur to Us the words of that illustrious Doctor of the Church. . . . "These," says Saint Augustine, "are all the blessings of matrimony on account of which matrimony itself is a blessing; *offspring, conjugal faith*

[84] *Casti connubii, A.A.S.*, XXII, 570. English translation from Husslein, *op. cit.*, II, 153.

[85] *Casti connubii, A.A.S.*, XXII, 534-55. English translation from Husslein, II, 139.

> *and the sacrament.*" And how under these three heads is contained a splendid summary of the whole doctrine of Christian marriage, the holy Doctor himself expressly declares when he says: "By *conjugal faith* it is provided that there should be no carnal intercourse outside the marriage bond with another man or woman; with regard to *offspring,* that children should be begotten of love, tenderly cared for and educated in a religious atmosphere; finally in its *sacramental aspect* that the marriage bond should not be broken and that a husband or wife, if separated, should not be joined to another even for the sake of offspring. This we regard as the law of marriage by which the fruitfulness of nature is adorned and the evil of incontinence is restrained." [86]

It is to be noted that these benefits of marriage involve a relationship to the ultimate end of man, namely, God as the Author of the natural and supernatural orders. As such they are of a higher moral order than mere temporal considerations.

Mutual solace and help which the contracting parties can give to each other and the alleviation of concupiscence are legitimate purposes of marriage. For these reasons the Church considers perfectly licit the marriage of even extremely old people as long as the primary ends of marriage have not been excluded positively and the contracting parties still have the power of rendering the marital debt.[87] Holy Mother the Church never loses sight of the great spiritual good that comes with marriage and for this reason is willing to permit certain undesirable features of a particular marriage in order that the greater benefits be secured for the spouses. For this reason, too, the Church law does not forbid those who have communicable diseases to contract marriages with parties who de-

[86] *Casti connubii, A.A.S.,* XXII, 543. English translation from Husslein, II, 128 f.

[87] "Ex hoc capite numquam nubere cupienti fit difficultas: nuptiae etiam in gravissima aetate permittuntur." Ioannes Chelodi, *Ius Canonicum de Matrimonio* (Vicenza: Società Anonima, 1947), p. 83. Also Arthurus Vermeersch, *Theologiae Moralis* (3rd ed.; Roma: Pontificia Universita Gregoriana, 1944), IV, 36: "Quamdiu *senes* facultatem copulae servant, matrimonio non sunt prohibendi. Id probat perpetuus usus Ecclesiae, quem ratio confirmat. Magna enim ad copulam propensio non est sublata. Ordini autem naturae repugnare videtur ut naturae propensio, seu corporum commixtio, omni usu licito pro magna hominum parte privetur."

sire such a marriage. Admittedly, certain diseases are great physical evils, but these evils must be compared to the natural and supernatural benefits of marriage itself and to the spiritual needs of the contracting parties who know of this diseased condition but have sufficiently good reasons for contracting marriage despite it. Dire physical ills have not yet been deemed by the Church to be of sufficient gravity to deprive a person of the natural right to marry and to marry the individual of one's choice. Likewise, the Church does not admit that mere extrinsic circumstances necessitate any violation against the great benefits of matrimony. Pope Pius XI observes:

> We are deeply touched by the sufferings of those parents who, in extreme want, experience great difficulty in rearing their children. However, they should take care lest the calamitous state of their external affairs should be the occasion for a much more calamitous error. *No difficulty can arise that justifies the putting aside of the law of God which forbids all acts intrinsically evil. There is no possible circumstance in which the husband and wife cannot, strengthened by the grace of God, fulfill faithfully their duties and preserve in wedlock their chastity unspotted.* This truth of Christian faith is expressed by the teaching of the Council of Trent. "Let no one be so rash as to assert that which the Fathers of the Council have placed under anathema, namely, that there are precepts of God impossible for the just to observe. God does not ask the impossible, but by His commands, instructs you to do what you are able, to pray for what you are not able that He may help you." *(Conc. Trident.,* Sess. vi, c. 11).[88]

[88] *Casti connubii, A.A.S.,* XXII, 561 f.: "Vehementer item nos percellunt illorum coniugum gemitus, qui dura egestate oppressi, gravissimam in alendis liberis difficultatem patiuntur.

"At cavendum omnino est ne funestae externarum rerum conditiones multo funestiori errori occasionem praebeant. Nullae enim exsurgere possunt difficultates quae mandatorum Dei, actus, ex interiore natura sua malos, vetantium obligationi derogare queant; in omnibus vero rerum adiunctis semper possunt coniuges fungi et castitatem a turpi hac macula illibatam in coniugio conservare; nam stat fidei christianae veritas, Synodi Tridentinae magisterio expressa: 'Nemo temeraria illa et a Patribus sub anathemate prohibita voce uti debet, Dei praecepta homini iustificato ad observandum esse impossibilia. Nam Deus impossibilia non iubet, sed iubendo movet et facere quod possis, et petere quod non possis, et adiuvat

These instances of marriages which have certain undesirable features but nevertheless are allowed by the Church indicate her great respect for the exercise of natural rights and her appreciation of the exalted worth of the benefits of marriage to the individual. For this reason, it would be somewhat incautious to brand interracial marriage in general in this country as something indiscreet. Christian prudence probes greater depths than the mere temporal welfare of the individual and the State, although it is not indifferent to the demands of either. However, it always evaluates the actions of man in terms of his ultimate end, namely, the possession of God in the Heavenly Kingdom.

Other possible and undesirable but not necessarily evil effects of entering upon an interracial marriage involving a white person in this country are the probable danger to happy community life because of the constant subjection to social discrimination, the so-called anomalous social position of children born to this type of marriage, the possible damage to the "social status" of members of the family of either spouse, and other dangers which might possibly arise. Concerning the arousal of race prejudice, it seems that this might be technically classified as pharisaical scandal. With regard to the other effects it is to be noted that similar dangers attend many other kinds of marriage; but if they are weighed in the balance of Christian prudence against the great benefits of marriage itself, they are not insurmountable obstacles to a happy married life.

Even in the States where the evil effect of stirring up race hatred would not be so likely to occur as in other States, there may be other undesirable concomitants of an interracial marriage which must be considered. Chief among these is the possibility of social ostracism. Such a marriage seems to be regarded in this country as a most unusual social phenomenon and might form the basis for exclusion from social intercourse for either party to the

ut possis.' *(Concil. Trident.,* sess. VI, cap. 11.)" English translation from Husslein, *op. cit.,* II, 145.

On the natural right of a person suffering from a social disease to enter upon marriage, cf. Francis J. Connell, C.SS.R., "Marriage and Social Disease," *The American Ecclesiastical Review,* XCIX (December, 1938), 507-518.

least, this reason for entering an interracial marriage even with a white person. These groups do not seem to be numerically large enough to unbalance to any great extent the sex-ratio of the white group by marrying into it and thereby make it more difficult for a white person to secure a mate of his own race group.

It might be that the entrance upon an interracial marriage is necessary for the spiritual well-being of the parties concerned. Perhaps they have lived together in concubinage and wish to validate the union. Here the spiritual good of the parties and the welfare of the children is more than sufficient cause for entering the marriage.

Human Love and Interracial Marriage

Is the ordinary human love that the betrothed have for each other sufficient reason for entering an interracial marriage under the present situation of social disapproval? As far as the parties are concerned human love seems to be sufficient reason. Subjectively it is perhaps a strong enough motive to overcome all sorts of social obstacles. The question here, however, is not merely the requiting of human love in an indiscriminate fashion, but through the exercise of a natural human right which in itself confers great benefits of a higher order than the social inconveniences already mentioned. Further, the exercise of this right to marry involves the right to marry a particular person and to have children of this particular person. In the ordinary course of human affairs, "falling in love" is the name given to the process of selecting a marriage partner. Love naturally seeks one person in preference to others. Although human love may and in some cases does pass away, that community of life and interests which are so essential to all successful marriages, fortified by the natural and supernatural benefits of marriage, has proved equal in similar adverse circumstances to the burden of carrying on the marriage. Human love, therefore, considered as the ordinary way a party expresses his preference for a marriage partner and as the prelude to great natural and supernatural benefits seems to be sufficient reason to contract such a marriage.

Love naturally seeks one person in preference to others, and the right to exercise this preference is so great that its exercise will justify the permission of a number of evil effects. This choice of a particular person *(electio)* is actually contained in and presupposed by the very notion of love *(dilectio)*. There is no human love without choice or election. Furthermore, to seek perfection is the universal law of all being. And it is human love that provides the very union necessary to secure the means for perfection of personality which marriage provides. Love unites creatures into a society in which the loved communicates the means of perfection to the lover.[96]

It is the love of the unique goodness of this particular person that makes merely human love sufficient reason for contracting interracial marriage. It is a goodness which, being attached to the uncommunicable person, is unshared by others.[97] It is in this sense that the person chosen is irreplaceable.

Human love, therefore, conceived as the motive for attaining perfection, is sufficient reason for contracting an interracial marriage. This is apparent from the application of the principle of double effect. This principle declares that it is morally permissible to place an act good or indifferent in itself and from which there follow two effects, one good and the other evil: (a) if the evil is not intended but merely permitted; (b) if the good effect is at least equally immediate with the evil effect; (c) if the good effect outweighs the evil effect.

Applied, the principle is this: interracial marriage is a morally good act. To intend to satisfy merely human love, conceived of as the ordinary way one enters upon marriage with all its benefits, is a good intention. The good effect of entering interracial marriage with this particular person perceived as a bearer of goodness perfective of the lover is at least equally immediate in causality with any evil effect. The perfection of the individual in his attainment of the benefits of marriage to this particular person outweighs what-

[96] Cf. Saint Thomas, *Summa Theologica*, I, q. 78, a. 1; I, IIae, q. 28, a. 1; I, IIae, q. 26, a. 3.

[97] Cf. Bernard J. Diggs, *Love and Being* (New York: Vanni, 1947), p. 148.

ever social inconveniences he may suffer as a result. If the good effect is conceived of as necessary to the individual in the spiritual order, it could outweigh even an evil affecting the merely temporal common good or the merely temporal rights of a third party. Hence, even human love can be conceived of as sufficient reason for entering an interracial marriage.

The Council of Trent seems to support this view in its declaration that the sacramental grace of Matrimony perfects the natural human love of the parties.[98] The inference is that natural human love is present to be perfected. This verifies the seemingly universal experience of mankind whereby human love is the ordinary manner of choosing one's partner in marriage.

In this whole discussion it must be admitted that the parties, if they be Catholic, have the right to ask for the sacraments and to receive them. It would be contrary to Catholic teaching to deny the right to receive the sacraments to anyone properly qualified.[99] In speaking of the sacraments, reference is made not only to the sacraments that lead up to the sacrament of matrimony, ordinarily Confession and Holy Communion, but the sacramental marriage itself. The sacraments cannot be denied to Catholics who are properly qualified and reasonably ask for them. A pastor would not be justified in refusing the sacraments to two Catholics for the reasons which have thus far been considered as objections to interracial marriage.[100] Whether he can refuse on the grounds that it is forbidden by the civil law and on the possibility that he would be fined or imprisoned as a result of his performing the ceremony is another matter and will be treated in a later chapter.

The rights of other persons that could be considered here are

[98] Sessio XXIV: "Gratiam vero, quae naturalem illum amorem perficeret, et indissolubilem unitatem confirmaret, coniugesque sanctificaret, ipse Christus, venerabilium sacramentorum institutor atque perfector, sua nobis passione promeruit." *Denz.* 969.

[99] Canon 682, *C.I.C.*, "Laici jus habent recipiendi a clero, ad normam ecclesiasticae disciplinae, spiritualia bona et potissimum adjumenta ad salutem necessaria." Also Canon 1035, which guarantees to all the right to marry.

[100] Cf. Kenrick, *op. cit.*; also Nau, *op. cit.*

such as the right one has to maintain his social status.[101] There is a possibility that members of the family of either party may suffer socially from the contraction of an interracial marriage by that person.[102] It cannot be proved that this would happen in every case but it is a factor which should be considered in exercising one's right to contract marriage in general. It is somewhat probable that in this country and at the present time in certain cases this right of a person's family to maintain its social status might suffer by that person's entrance upon an interracial marriage. Many Negroes look askance at such marriages.[103] This loss of "status" is practically never intended by the contracting parties and for sufficient reason they can permit it. As pointed out above, sufficient reason is not lacking.

Values in Marriage and Interracial Marriage

Marriage has certain values which must be preserved. These are great benefits not only to the individual but also to society. They have already been considered as great benefits of marriage, namely, offspring, fidelity, and indissolubility.[104] There is nothing inherent in the concept of interracial marriage that would militate against the three values or blessings of marriage just enumerated. It might, however, be objected that the problems of interracial marriage are not abstractions but must be considered in view of the concrete circumstances of the present time. Pope Pius XI saw fit to judge many problems of marriage in the light of their bearing on offspring, fidelity, and indissolubility.[105] It seems fitting, there-

[101] All other things being equal, a person has the right to maintain his social status. For this reason the older theologians would allow the parents to annul such engagements where either the son or daughter had promised himself or herself in marriage to a person of decidedly inferior social status. Cf. Thomas Sanchez, *Disputationum de Sancto Matrimonii Sacramento*, lib. I, disp. XIV, nn. 1, 2; *infra*, n. 66.

[102] Cf. Young, *op. cit.*, pp. 413 f.

[103] Cf. Drake and Cayton, *op. cit.*, pp. 140 ff.

[104] Pope Pius XI, Encyclical *Casti connubii*, *A.A.S.*, XXII (31 December, 1930), 539-92. English translation "Christian Marriage in our Day," Husslein, II, 129.

[105] *Ibid.*

fore, to look at this problem of mixed-race marriage in the light of safeguarding the same three values.

The first, the blessing of children, should be a blessing that is received with joy from God. However, the obligation of parents does not stop here. The children must be educated and cared for until they can take their rightful place in society.[106] Children arising from an interracial marriage may be at a disadvantage. They probably will not find a place in white society — especially when their features are distinctly non-white.[107] They may be more favored in the colored group.[108] There is a mere possibility, nevertheless, that they may have to be raised in an atmosphere of strain — the deleterious effect of which strain on the psychic constitution has been recognized.[109] American social discrimination against the Negro and the likely non-acceptance of the hybrid on a plane of social equality are factors not to be neglected in a consideration of the good of the offspring. Even with the numerically smaller racial minorities, such as the Japanese and the Chinese, this is a factor to be considered. These undesirable possibilities, however, do not seem to outweigh the actually great blessing of having children and having these children from the particular partner of one's own choice. Besides, the children can be educated in such a fashion to form their characters to survive under such difficulties and even to compensate for them. The fact that there have been great leaders of the colored race who had mixed-blood is some proof that these difficulties may be overcome.

Conjugal fidelity, or the mutual fidelity of the spouses in fulfilling the marriage contract, is the second blessing of matrimony which must be viewed as affected by the racial factors in view of a possible objection on this score. Again, in itself, an interracial marriage is not a threat to fidelity. However, some may object that with social discrimination meeting the parties on every side it could be a grave source of temptation. First of all, temptation in itself is

[106] *Ibid.*, pp. 130, 131.

[107] Cf. *To Secure These Rights, passim;* also Young, pp. 396, 414 f.

[108] Cf. Gunnar Myrdal, *An American Dilemma* (New York: Harper, 1944), pp. 696-99.

[109] Young, *op. cit.*, pp. 414 ff.

no sin, nor can it be seriously contended that a person deliberately places himself in the occasion of sin by entering an interracial marriage which is in itself a morally good act. Besides, it is not impossible to live a Christian life in any circumstances with the help of God's grace. Secondly, the unfortunate history of miscegenation in this country proves nothing conclusive on this point. Little opportunity has been given to this type of marriage to prove that it conduces toward infidelity in a special way.[110]

The third blessing of marriage is indissolubility. With baptized persons this assumes a special sacramental nature, but even the natural marriage bond of the unbaptized is *per se* indissoluble. In those States where interracial marriage is forbidden by law this is the characteristic of marriage which is particularly attacked, for in such States the bond is supposed never to have arisen.[111] No legally indissoluble civil bond, even though it be valid by Divine Law, can be set up at all in most of the States forbidding such marriages. In those cases where interracial marriage has been entered into against the civil law and without the knowledge of the authorities there is always the great danger on discovery that the parties will be forced to separate and will even be punished.[112] Although the State might force the parties to separate legally, it does not have any power to dissolve a valid marriage bond, be it sacramental or merely natural.[113] In States where interracial marriage is not forbidden by law, the same threat against indissolubility does not exist. The social ostracism which might be incurred by the white person or by the person of the other race, might put a strain on the

[110] Myrdal, *op. cit.*, pp. 123-29.

[111] "An interracial marriage is absolutely void in those states where it is unlawful and not just voidable." Mangum, *op. cit.*, p. 244.

[112] In the case of two Catholics who wish to contract an interracial marriage, cf. Dillon, *op. cit.*, p. 53.

[113] With regard to the civil effect of such marriages, Mangum, *op. cit.*, p. 244, writes: "No action is needed to invalidate the marriage of a white person and a Negro, the union being null and void *ab initio*, and this illegality may be set up in court by any party to whom the alleged marriage is opposed, directly or collaterally." Cf. Drake and Cayton, *op. cit.*, p. 153 for examples.

smooth running of the household. Divorce being as rampant as it is in this country and so easy to procure, it might seem indiscreet to enter a marriage which could have so many social factors militating against it. The possibility of indiscretion being present in entering such a marriage must be judged in each individual case because it is a relative matter depending on locality and individual disposition. No general disapproval of interracial marriage, however, seems justified on the possibility of the threat to indissolubility coming from such uncertain sources.

The stresses placed on happy married life that might possibly be set up by the circumstances of an interracial marriage have been compared to those which mark a mixed marriage in the field of religion.[114] The similarity between the two types of marriage, however, extends merely to the circumstances and not to the right involved. Mixed-race marriages, *in themselves,* do not conflict with any divine law or law of the Church. Marriages of mixed-religion are forbidden by the Catholic Church and are sometimes opposed also to the Divine Natural Law. Mere allowance by the Catholic Church, therefore, does not argue that a real right to enter a marriage of mixed-religion exists. Sometimes it is permitted to avoid a greater evil.

Obviously, the danger surrounding an interracial marriage is not a danger to the faith of the Catholic parties. It is, nevertheless, only common sense to say that ordinarily the compatibility of marriage partners is largely dependent upon similarities existing between them. Difference of religion is a difference which is not limited to the individual parties to the marriage; it involves the family on either side, the friends who are also divided in their religious loyalties, and sometimes a totally different world outlook.[115] Abstracting from religious implications, difference of race where it exists between spouses might in certain instances raise somewhat similar threats against domestic love and peace. The

[114] John La Farge, *The Race Question and the Negro* (New York: Longmans, Green, 1943), pp. 195 ff.

[115] Young, *op. cit.,* p. 414.

Church considers the threat in the case of a mixed-religion marriage an objectively grave threat to the faith of the Catholic party and requires objectively grave reasons before allowing such a marriage. It seems that interracial marriage, because of the circumstances of the times here in the United States, could be attended with dangers, but these are not dangers to the faith of the parties and are not necessarily grave threats. Father John La Farge points out that "the force of such moral objections will vary with the variations of local as well as personal circumstances." [116] He also states that "such a union would expose to legal invalidity and punishment in certain States of the Union." [117] It is without doubt the work of Christian prudence to evaluate these dangers in a given case against the benefits sought in marriage. It has been contended that those couples that would rashly enter into such a marriage without weighing all these factors might violate an obligation imposed by the virtue of prudence, which directs man in "the most important matters of life to use his most distinctive faculty, his reason, and to seek out and to follow the means best adapted for the attainment of his own welfare. They violate an obligation imposed by the virtue of piety, which obliges married people in so far as they are able, to create a home which will guarantee the physical and moral well-being of their children." [118] These are possibilities, of course, but considered in the light of Christian prudence, the great natural and supernatural benefits coming from marriage itself must also enter into the evaluation. These seems to be of such a high order as to outweigh the undesirable features of interracial marriage. As to the violation of the virtue of piety, it is conceivable that the offspring may be at a disadvantage with respect to certain social prerogatives. True, there is an obligation to avoid this. On the other hand, the more fundamental right to marry and to marry a particular person of one's own prudent choice seems to be more urgent than the obligation arising from the virtue of piety towards children who are yet unconceived. In concluding this par-

[116] La Farge, *op. cit.*, pp. 195 ff.
[117] *Ibid.*
[118] Gilligan, *op. cit.*, p. 90.

ticular section it is to be observed that since the force of moral and social objections to these marriages varies so much with local and personal circumstances, Christian prudence having been observed, the charge of indiscretion cannot be leveled against them as a general rule.

Psychological and Biological Aspects

Confronted by the fact of the widespread mixing of races throughout the world by interbreeding, it is foolhardy to insist that there is a natural aversion to the mixing of races by marriage.[119] That some people do have a repugnance to marriage with members of widely disparate races is certainly a fact. To claim that nature itself has set up this psychological barrier is contrary to common observation and to scientific studies.[120] Racial attitudes are acquired and are not something nature has provided for man.[121] Therefore, no moral argument against interracial marriage from an alleged inbred race prejudice is warranted.

On the other hand, if the mixing of the races through marriage were to prove biologically harmful to the offspring, a serious objection could be made to interracial marriage. It is not necessary to demonstrate that nature has set up no barriers to interracial

[119] Young reviews this objection and observes, *op. cit.*, pp. 406 f.: "Yet there are millions of mulattoes living in the United States, and it is an obviously farcical rationalization to account for their presence in terms of 'pathological miscegenation.' Some Negroes had white blood before they were brought to this country. A large proportion of the increase in mulattoes in the United States has come about through the intermarriage of mulattoes and without the direct infusion of any more white blood than there was in the parent generation. The racial repulsion of the Negro must have been overcome in thousands of white men who had the excuse of neither a high sex ratio nor of restraints broken through migration. Naturally, many of the race crossings were between white men and mulattoes with a minimum of Negroid features and characteristics."

[120] Cf. Bruno Lasker, *Race Attitudes in Children* (New York: Henry Holt and Co., 1927), pp. 8 ff.; also Harry Shapiro's study of the Pitcairn Islanders in *The Heritage of the Bounty* (New York: Simon and Schuster, 1936), pp. 217 ff.; also Donald Pierson, *Negroes in Brazil* (Chicago: University of Chicago Press, 1942), pp. 115, 143, 147, 155.

[121] Cf. Lasker, *op. cit.*, pp. 58-62.

marriage from the standpoint of the proper performance of the marital act. Whenever groups of people have traveled from one place to another where they have met other races of people, some of them have married into these differing groups and have had children. The apparent interfertility of all mankind, however, is no conclusive argument for the desirability of interracial marriage, for it may be contended that the biological product of such a union is inferior to either parent stock. On the contrary, this contention cannot seriously be held in the face of scientific inquiries into the biology of the hybrid.[122]

By crossing dissimilar breeds of *rabbits* attempts were made to show that racial crossing tends to produce physical deterioration both in rabbits and in humans.[123] The impracticability of investigating the question critically in human populations was admitted, and for that reason the investigator resorted to experiments with rabbits for critical evidence. In his criticism of these experiments, W. E. Castle of Bussey Institution, Harvard University, holds that the conclusions rested on insufficient and uncritical observations.[124] He asks why, if nature abhors race crossing, she does so much of it? Are there such things as "harmonic" and "disharmonic" race crossings? He answers his own questions by doubting whether there are any race combinations which are, so far as biological qualities are concerned, inherently either harmonic or disharmonic, that is, productive of better or worse genetic combinations. He adds that both better and worse should theoretically result, if all inherited characters follow Mendel's Law in transmission, and that a more variable population would then result, which should be on the whole more adaptable to a new or changing environment either physical or social. What is more, if all inheritance of human traits were simple Mendelian inheritances and natural selection were unlimited in its action among human populations, then unrestricted racial

[122] W. E. Castle, "Biological and Social Consequences of Race-Crossing," *American Journal of Physical Anthropology,* IX (April-June, 1926), 145-56; Shapiro, *op. cit.,* pp. 217 ff.

[123] Alfred Mjoen, "Harmonic and Unharmonic Race Crossings," in *Eugenic Review,* XIV (1922), 35-40; cf Young, *op. cit.,* p. 392.

[124] Cf. Castle, *op. cit.,* pp. 148 ff.

intercrossing might be recommended. However, in the light of present knowledge, few would recommend it. He insists that, in the first place, much of that which is best in human existence is a matter of social inheritance, not biological. Speaking exclusively of biological characteristics, he states that few of them follow the simple Mendelian law, with the presence or absence of single characters, dominance, or elimination. Most inherited characters are blending; that is, when parents differ in a trait, the offspring commonly possess an intermediate degree of it. The children are as a rule intermediate between their parents as regards such traits except for the complication of hybrid vigor or "heterosis" in the sons or daughters of the initial mating. When traits blend in human crosses, deterioration is not to be expected as a consequence, but rather an intermediate degree of the characters involved. Hence, so far as biological considerations are concerned, there is no race problem in the United States. If social considerations were not much more powerful than biological ones the future population of the United States, Castle speculates, would be highly variable in skin color and intelligence. Unfortunately, the social considerations *are* of much more importance than biological ones in this connection, and the racial future of the United States may not be predicted from biology alone. This eminent scientist concludes his observations with a very significant paragraph:

> So far as a biologist can see, human race problems are not biological problems any more than rabbit crosses are social problems. The rabbit breeder does not cross his selected races of rabbits unless he desires to improve upon what he has. The sociologist who is satisfied with human society as now constituted may reasonably decry race crossing. But let him do so on social grounds only. He will wait in vain, if he waits to see mixed races vanish from any biological unfitness.[125]

[125] Castle, *op. cit.*, p. 156. Castle's statement is supported by this excerpt from the "Biologists' Manifesto" issued at the Seventh International Genetics Congress, Edinburgh (August 28-30, 1939), and signed by such famous biologists as J. B. S. Haldane, F.R.S., and J. S. Huxley, F.R.S.

"The question 'how could the world's population be improved most effectively genetically' raises far broader problems than the purely biological ones, problems which the biologist unavoidably encounters as soon as he

Scientists have concluded that, as far as it is known, there are no immutable laws of nature that make racial intermixture harmful.[126] For this reason, it seems that no case can be made for the morality or immorality of interracial marriage on the basis of biology or psychology.

Conclusions

Although interracial marriages have certain undesirable features, especially where they involve a white person in this country at the present time, nevertheless the fact that the Church will allow this type of marriage to her qualified subjects indicates her great respect for the exercise of natural rights and her appreciation of the exalted worth of the benefits of marriage to the individual and

tries to get the principles of his own special field put into practice. For the effective genetic improvement of mankind is dependent upon major changes in social conditions, and correlative changes in human attitudes. In the first place there can be no valid basis for estimating and comparing the intrinsic worth of different individuals without economic and social conditions which provide approximately equal opportunities for all members of society instead of stratifying them from birth into classes with widely different privileges.

"The second major hindrance to genetic improvement lies in the economic and political conditions which foster antagonism between different peoples, nations, and 'races.' The removal of race prejudices and of the unscientific doctrine that good or bad genes are the monopoly of particular peoples or of persons with features of a given kind will not be possible, however, before the conditions which make for war and economic exploitation have been eliminated." Ruth Benedict, *Race: Science and Politics* (New York: Viking, 1945), pp. 198 f.

[126] Ruth Benedict and Gene Weltfish, "The Races of Mankind," *Public Affairs Pamphlet* (New York: Public Affairs Committee, 1946), p. 14; also Young, pp. 393 ff. On the possibility of a "black baby" as the offspring of a mixed-race (black and white) marriage see Drake and Cayton, *op. cit.*, p. 172; also Myrdal, *op. cit.*, pp. 114, 1208 f. Authorities are not unanimous, but the majority discount its possibility in a pure-white, pure-black marriage. Where the parties to marriage themselves both possess mixed blood the offspring may be darker than either, but — as Drake and Cayton say — would in all probability not be black.

to society. For this reason, it would be somewhat incautious to brand interracial marriage in general as something morally reproachable. There is little in the official documents of the Catholic Church bearing on interracial marriage, but where there is even an indirect reference the Church does not seem to indicate any displeasure. Certain particular councils of the Church in localities where interracial marriage is more or less common have no legislation that indicates that these marriages should be discouraged. On the other hand, these same particular councils are extremely solicitous for the spiritual welfare of the underprivileged group. The right to marry interracially and the individual of one's choice is a corollary of the natural right to marry in general. Since the exercise of natural rights is highly beneficial in itself, the same beneficial nature of exercising the right to marry interracially demands recognition. Collectively taken, the teaching of individual Catholic writers indicates that the entrance upon an interracial marriage is a morally good act despite certain undesirable circumstances that might accompany it in this country.

These conclusions presume that the marriages in question have been entered upon in accordance with the dictates of Christian prudence. This prudence is based upon the principles of Christian faith and refers all things to the supernatural end of man, namely, God as He is known and loved on earth and as He is possessed in heaven. Christian prudence is not only concerned with man's destiny here on earth but also with his eternal destiny. In entering upon an interracial marriage when all the requirements of Christian prudence are fulfilled the individuals concerned act without reproach. In this evaluation it was recognized that there are advantages and benefits of sacramental and even natural marriage, the desire of which constitutes a motive of such a high order as to transcend other considerations of a lower order of importance militating against entrance upon an interracial marriage. These benefits involve a relationship to the ultimate end of man and as such they are of a higher order than mere temporal considerations.

The various objections which may be placed against interracial marriages, some of which are more or less grave, do not seem to be of sufficient weight in light of the principle of double effect to for-

bid interracial marriage when the parties themselves desire the exalted benefits of marriage and in their prudent judgment choose this particular type of marriage to secure them. Hence, even human love, considered as the ordinary way a person expresses his preference for a marriage partner and as the prelude to great natural and supernatural benefits seems to be sufficient reason to contract such a marriage. Finally, it is to be observed that since the force of moral and social objections to these marriages varies so much with local and personal circumstances, Christian prudence having been observed, the charge of indiscretion cannot be leveled against them as a general rule.

CHAPTER III

LEGAL RACIAL RESTRICTIONS ON THE CHOICE OF A MARRIAGE PARTNER

Description of the Laws

Preliminary: Ordinarily, when a superior authority enacts a law meant to bind its subjects, it is presumed that the law is a just law. Consequently, unless the person who is subject to the authority of the lawmaker has sufficient reason to be *certain* of the opposite, i.e., that the law is unjust, he is bound to observe the law.[1] However, the presumption of the justice of any particular law is one that will yield to the proof of the opposite. Excepting the exclusive competence of the Catholic Church over all baptized persons in marriage legislation, thus far the presumption among responsible Catholic writers who have concerned themselves with the problem, based on various reasons, is that the laws forbidding interracial marriages in this country have some binding force in conscience. Another point not to be overlooked from the civil viewpoint is that these laws so far have never been declared unconstitutional by the Supreme Court of the United States.[2] On the other

[1] J. Aertnys and C. A. Damen, *Theologia Moralis* (14th ed.; Torino: Marietti, 1944), I, n. 85: "Lex vel praeceptum de quo dubitatur num justum sit, justum habetur, donec injustitia probetur; unde principium: 'In dubio obsequendum est Superiori.' "; cf. also Henricus Merkelbach, *Summa Theologiae Moralis* (3 vols.; 3rd ed.; Paris: Desclée, 1938), I, n. 286.

[2] C. B. Alford, *Jus Matrimoniale Comparatum* (New York: Kenedy, 1938), p. 146: "Hoc non pro certo asserimus, et locum adhuc esse controversiae admittimus; attamen, donec contrarium probetur, seu dum quaestio auctoritative non dirimatur, sententia quae Statui tribuit jus statuendi pro non-baptizatis impedimentum disparitatis sanguinis, prout in Statibus Foederatus Americae habetur, probabilior videtur." This is also indicated by William J. Goldsmith, *Competence of Church and State over Marriage — Disputed Points* (Washington: Catholic University of America Press, 1944), p. 85; cf. also John La Farge, *The Race Question and the Negro* (New York: Longmans, Green, 1943), pp. 195 ff.

hand, the fact that the wisdom and justice of these laws have been questioned by serious and disinterested qualified observers justifies an investigation of these laws to ascertain their validity.[3] As a

Concerning the constitutionality of these laws see Charles S. Mangum, *The Legal Status of the Negro* (Chapel Hill: University of North Carolina Press, 1940), pp. 239-41; in *State v. Tutty*, 41 Federal 753 (Circuit Court Southern District Georgia 1890), the court ruled that the Georgia statute was not in violation of the United States Constitution: "(a) . . . the state marriage regulations did not deny to a citizen equal protection of the laws — for the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that, and none other, which is inflicted on the white citizen. . . . (b) . . . the marriage contract is not contemplated by the prohibition of the Constitution of the United States against the impairment of contracts by state legislation. . . . It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution, or annulling a relation between the parties is not within the prohibition of the constitution of the United States against impairment of contracts by legislation."

[3] Chester G. Vernier, *American Family Laws* (Stanford University, California: Stanford University Press, 1931), I, 204: "But racial prejudice, social or ethnological considerations, or the dogma of white superiority have resulted in the prohibition of inter-racial marriages."

Yale Law Review, XXXVI (April, 1927), 858: "The wisdom of such legislation may well be questioned; reasons advanced in its favor are largely mythical and seem based on popular prejudice. They stress the importance of the purity of the races, the inferiority of the cross-breed to either pure race, and the loss to society through intermarriage between members of the 'superior' white race and members of the 'inferior' negro race."

Report of the Commission on Mixed Marriages in South Africa (Pretoria, Union of South Africa: Government Printer, 1939), p. 40; Mrs. N. B. Spilhaus, M.P.C., has this to say in her minority report: "I hold very strongly that legislation on the subject of mixed marriages [interracial marriages] is quite unjustifiable. They are not on the increase or likely to increase, and they are certainly not sufficiently numerous to be detrimental in any way to the future composition of our population.

"Perusal of the report shows how the idea of the hegemony of the whites is being pursued and bolstered up by the passing of more and more discriminatory legislation against the non-Europeans. But the grave consequence to European prestige of illicit miscegenation cannot be too strongly emphasized. If we are to remain the ruling race, we must be worthy to rule.

"If I thought legislation against extra-marital miscegenation could possibly be applied, I should be strongly in favor of its being enacted without

preliminary to this investigation the present chapter will attempt a description of the legislation against interracial marriage from the standpoint of their historical development, the classes of forbidden partners, the legal effects on marriage, the penalties, the status of children born to such unions, the purpose of the laws and the intention of the lawmakers.

Historical sketch. Before any accurate appraisal of these laws can be made, they must first be presented in their historical setting.[4] The common law of England forms the basis for the legal system in the United States, except that French law predominates in Louisiana and the Spanish law has influenced the jurisprudence of the southwestern States.[5]. There was no prohibition of interracial

delay, leaving marriage alone. The State would then set the seal of its displeasure on the dishonouring of women of the backward races — to which it stands in the position of guardian." This report was officially requested and authorized by the Union of South Africa in an effort to determine the advisability of anti-miscegenation legislation there. The majority report recommended mild anti-miscegenation legislation; mild, that is, in comparison to the laws that exist in the United States of America. Cf. pp. 25 ff.

Consult also Milton R. Konvitz, *The Alien and the Asiatic in American Law* (Ithaca: Cornell University, 1946), chap. ix, "Miscegenation"; Monsignor Louis J. Nau, *Marriage Laws of the Code of Canon Law* (New York-Cincinnati: Pustet, 1934), p. 15.

[4] Irving G. Tragen, "Statutory Prohibition Against Intermarriage," *California Law Review,* XXXII (September, 1944), 269.

[5] Francis P. Le Buffe, S.J., and James V. Hayes, *The American Philosophy of Law* (4th ed.; New York: Crusader Press, 1947), p. v; also Geoffrey May, *Marriage Laws and Decisions in the United States* (New York: Russell Sage Foundation, 1929), p. 6: "Behind these statutes, i.e., laws in general, and independent of them, is the common law. In theory it is a universal concept (in English speaking countries) existing even as social relations themselves exist. It is unwritten in the sense that any social system is unwritten; the evidences, the interpretations of it alone are written. Such interpretations are expressed in decisions of courts on particular cases coming before them. They are an expression of the application of this body of the common law to the particular set of facts in litigation. The court decisions theoretically do not create the common law; they express it. The volumes containing these decisions when published are known as reports. Usually only the decisions of the higher courts are printed; these are rendered in cases on appeal which discuss almost exclusively questions of law rather than questions of fact.

marriage in the common law as it was developed in England.[6] It must be recalled, however, that the common law had its origin in a country populated entirely by the white race. Hence, occasions did not arise to produce any demand for such prohibition. When the English settlers emigrated to the New World they brought with them their common law. The presence of newly imported Negro slaves, and possibly of free Negroes who might in some manner have escaped from their chains, swiftly developed the problem of interracial marriage. This problem, so considered, was recognized, and to cope with it miscegenation statutes were written at an early date. Among the first statutes was that enacted by the Colony of Maryland in 1661.[7] At least five colonies had established legislative bans and provided punishments for the contracting of interracial marriage between whites and Negroes before the American Revolution, namely, Maryland, Massachusetts, North Carolina, Pennsylvania, and Virginia. Territorially, this prohibition has been extended much further since then up to the present time. Several States have repealed the laws they formerly had against intermarriage: Maine, Massachusetts, Michigan, Ohio, Pennsylvania, Rhode Island, New Mexico and California. Other States have refused to adopt such legislation when it was proposed, either offered for the first time or subsequent to repeal, namely, Massachusetts, Connecticut, Kansas, Wisconsin, Illinois, Iowa, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Washington, all since 1920.[8] In 1916 an unsuccessful attempt was made to have such an anti-miscegenation law passed in the District of Columbia.[9] Despite the

"To some degree court decisions interpret the statutes. To a larger degree they express the common law. And even in the interpretation of statutes courts are guided by common law principles in the absence of a special statutory regulation. Statutes are considered by the courts to be enacted in relation to the common law, the existing system; where they do not specifically change it, the system is assumed to continue."

[6] Tragen, *op. cit.*, p. 269.

[7] *Proceedings of the General Assembly of Maryland, 1637-1664* (Baltimore, 1883).

[8] Tragen, *op. cit.*, pp. 269 f.

[9] "Hearing before the Committee on the District of Columbia — intermarriage of whites and Negroes in the District of Columbia and Separate

rejection of such laws in a good many of the States of the Union, they exist in one form or another in twenty-nine States, mostly in the southern, southwestern, and far western States: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.[10]

Accommodations in Street Cars for whites and Negroes in the District of Columbia on H. R. 12, H. R. 13, H. R. 274, etc. . . ." February 11, 1916 (Washington: Government Printing Office, 1916).

[10] References are to sections unless otherwise noted: *Code of Alabama* 1940, Title 14, pars. 360, 361; *Constitution,* sec. 102, art. 4; *Locklayer v. Locklayer,* 139 Ala. 354. *Arizona Revised Code* 1928, 2161, 4485; *Penal Code* 241-19; *Session Laws* 1942 (1st Extra Session), c. 12, par. 1. *Digest of the Statutes of Arkansas* (Pope) 1943, 3288, 9019, 9029. *Colorado Statutes Annotated* 1935, 102-2, 107-2, 107-3. *Delaware Revised Code* 1935, 3845, 2992. *Florida Statutes Annotated* 1941, 1947, 741.11, 741.12, 741.15; *Free v. State* 142 Fla. 233; *Whittington v. McCaskill,* 65 Fla. 163. *Code of Georgia* 1933; *Laws* 1935, 1947, 26-5801, 53-106, 53-9902. *Idaho Code Annotated* 1932, 32-206, 31-406; also sec. 45. *Baldwin's Indiana Annotated Statutes* 1934, 5619, 2906, 2907. *Kentucky Revised Statutes* 1946, 402.020, 402.990; *McGoodwin v. Shelby,* 182 Ky. 377. *Louisiana General Statutes* (Dart) 1939, *General Statutes* 2186, 2185; *Criminal Code* 1942, art. 79; *Civil Code* 94. *Annotated Code of Maryland* 1939, 27-445, 27-358. *Mississippi Code Annotated* 1942, 459. *Missouri Revised Statutes Annotated* 1939, 3361, 4651, 4652. *Revised Code of Montana* 1935, 5700-5702, 11006, 5704. *Revised Statutes of Nebraska* 1943, 42-103, 28-929, 42-113. *Compiled Laws of Nevada* 1929, 10197, 10198. *General Statutes of North Carolina* 1943, 51-3, 14-182, 14-181; *Constitution,* art. 14, par. 8. *Revised Code of North Dakota* 1943, 14-0304, 14-0305, 14-0327. *Oklahoma Statutes* 1941, 43-12, 43-13, 43-14; *Constitution,* art. 23, par. 11; *Blake v. Sessions,* 94 Okla. 59. *Oregon Compiled Laws Annotated* 1940, 9-902, 23-1010-1012, 63-102. *Code of Laws of South Carolina* 1942, 1438, 8571; *Constitution,* art. 3, par. 33; *Criminal Law* 378. *South Dakota Code* of 1939, 14-0106, 14-9901, 14-9906. *Annotated Code of Tennessee* (Williams) 1934, 8409, 8410, 8423; *Constitution,* art. 11, par. 14; *Carter v. Montgomery,* 2 Chan. 216; *State v. Bell,* 7 Baxter 9; 32 Am. Rep. 549. *Vernon's Complete Texas Statutes* 1936, 4607; *Penal Code* 492, 493. *Utah Code Annotated* 1943, 40-1-2, 103-1-16, 40-1-15. *Virginia Code of* 1942 (Michie, Sublett, Stedman), 5087, 5099a, 4546, 4547. *West Virginia*

Fourteen of these States also forbid the marriage of a white person to a Mongolian: Arizona, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Utah, Virginia, and Wyoming.[11] Ten have laws forbidding marriage with Malayans: Arizona, Georgia, Maryland, Nevada, Oregon, South Carolina, South Dakota, Utah, Virginia, and Wyoming.[12] At least four have laws forbidding white persons to marry Indians, namely, North Carolina, Oregon, South Carolina, and Georgia.[13] In Oklahoma and Louisiana Indians and Negroes are not allowed to intermarry.[14] North Carolina makes special mention of the Cherokee Indians of Robeson County who are not permitted to marry Negroes.[15] Maryland forbids Negroes to marry Malayans.[16] California also directed her law, now recalled, against the Filipinos, who are classed as Malayans.[17]

Forbidden Partners. In all twenty-nine of the States having these laws, a white person is forbidden to marry a Negro. Just who is a Negro under these statutes is a question that cannot be answered categorically.[18] The statutes themselves and the interpretation put upon them by the courts vary from State to State, and even within the same State discrepancies have been found.[19] Most of the States

Code Annotated (Michie, Sublett, Stedman) 1943, 4701, 4697. *Wyoming Compiled Statutes Annotated* 1945, 50-108, 50-109. These laws have been brought up to date by means of the *State Law Index,* Reports No. 21 (May 27, 1944), and No. 23 (March 21, 1946) on "Marriage" in the files of the Legislative Reference Service, Congressional Library, Washington, D. C. Where the cumulative session statutes were available for 1947, these were checked for any new legislation. None was found. January 31, 1948. Consult the appendix for a digest of these laws.

[11] *Loc. cit., supra,* n. 10.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.,* cf. also appendix.

[15] *General Statutes of North Carolina* 1943, 51-3.

[16] *Annotated Code of Maryland* 1939, 27-445.

[17] *California Civil Code 1941,* 60 as amended 1933.

[18] Consult table in appendix.

[19] Charles S. Mangum, *Legal Status of the Negro* (Chapel Hill: University of North Carolina Press, 1940), pp. 245 f.

specify "Negro" blood and leave it up to the courts to follow the precedents already established for such cases. Some specify "1/8 or more Negro blood," some "1/16," some "any." Some leave it up to the judgment of the Court.[20] Georgia has established an elaborate system for determining who is a Negro, but has failed to make appropriations to enable it to function.[21]

The fourteen States that prohibit a white person from marrying a Mongolian (meaning Japanese and Chinese for the most part) are located in the Southwest and Far West of the United States, with the exception of Georgia, Mississippi, South Carolina, and Virginia in the East.[22] As a rule, any amount of Mongolian blood seems to render such a person legally unfit for marriage with a white person in the States where it is forbidden.[23] Some few of the States actually specify the proportion of blood necessary to constitute a person legally a Mongolian.[24]

Malayans are also an unfavored group with regard to marriage with white persons. Arizona, Georgia, Maryland, Nevada, Oregon, South Carolina, South Dakota, Utah, Virginia, and Wyoming reject them as marriage partners for whites.[25] In California Filipinos were excluded by a former law as marriage partners for whites.[26]

[20] *Ibid.*

[21] May, *op. cit.*, p. 110.

[22] Other States are Arizona, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Idaho, and Wyoming.

[23] Arizona, Georgia, Montana, Nevada, South Dakota, Utah, Virginia and Wyoming do not specify the exact amount.

[24] Mississippi, one-eighth; Nebraska, one-eighth; Oregon, one-quarter; South Carolina, one-eighth.

[25] Consult appendix and n. 10 *supra* for law sources.

[26] Iris B. Bauken, "You Can't Marry a Filipino," *Commonweal,* XLI (March 16, 1945), 534-37.

The following observation of the report of the President's Committee on Civil Rights gives some indication that the fact that these groups, for the most part, could not become citizens or own land might have a bearing on their being forbidden the right to enter marriage with a white person:

"In addition to the disabilities suffered by ineligible aliens at the hands of private persons — in employment, housing, etc. — they are singled out for additional discrimination under the law. Arizona, California, Idaho, Kansas, Louisiana, Montana, New Mexico, and Oregon forbid or severely

The amount of Malayan blood needed to qualify one for this prohibition is unspecified in most instances. In many of the States having these laws there have been occasions to restrict the marriages of whites so as to exclude as partners Indians, mestizos, Coreans, Hindus, and Asiatic Indians, plus a variety of other groups also not classed as white.

Legal Effect on Marriage

It is not to be argued from the following description that the legal effect of the States' prohibition of these marriages is an effect that necessarily must be recognized by the Church. The Holy Roman Catholic Church has the exclusive right to legislate for her subjects (all baptized persons) on this matter.[27] The binding force of anti-miscegenetic laws on the unbaptized is one of the points to be discussed later. For the present, this section will merely set forth the legal effect the States achieve by means of these laws.

It is the opinion of Vernier, an outstanding authority on American family law, that as a general rule, which has been adopted by law in most of the States, prohibited interracial marriages are declared null and void from the beginning as far as the civil law is concerned.[28] The language used in some of the statutes could conceivably be taken as rendering such marriages merely "voidable." [29]

restrict land ownership by ineligible aliens." President's Committee on Civil Rights, *To Secure These Rights* (New York: Simon and Schuster, 1947), p. 33.

[27] *C.I.C.*, C. 1038, §2: "Eidem supremae auctoritati privative jus est alia impedimenta matrimonium impedientia vel dirimentia pro baptizatis constituendi per modum legis sive universalis sive particularis."

[28] Chester G. Vernier, *op. cit.*, I, 204 f.

[29] *Bouvier's Law Dictionary*, W. E. Baldwin, editor (Cleveland: Banks-Baldwin, 1946), p. 862: "The requisites of a valid and binding marriage have been considered in the article on that subject. If any of these requisites are wanting in a given case, the marriage is either absolutely void, or voidable at the election of one or both of the parties. The more usual imperfections which thus render a marriage void or voidable are: (1) Unsoundness of mind in either of the parties. (2) Want of age, i.e., fourteen in males and twelve in females. (3) Fraud or error; but these must relate to

However, such terms as "null and void," "illegal and void," "utterly null and void," seem clear declarations of complete nullity,

the essentials of the relation, as personal identity, and not merely to the accidentals, as character, condition, or fortune. (4) Duress. (5) Physical impotence, which must exist at the time of the marriage and be incurable. (6) Consanguinity or affinity within the prohibited degrees. (7) A prior subsisting marriage of either of the parties. The fifth and sixth are termed canonical, the remainder, civil impediments.

"The distinction between the two is important — the latter rendering the marriage absolutely *void,* while the former only renders it *voidable.* In the one case, it is not necessary (though it is certainly advisable) to bring a suit to have nullity of the marriage ascertained and declared: it may be treated by the parties as no marriage, and will be so regarded in all judicial proceedings. In the other case, the marriage will be treated as valid and binding until its nullity is ascertained and declared by a competent court in a suit instituted for that purpose; and this must be done during the lifetime of both parties; if it is deferred until the death of either, the marriage will always remain good. But the effect of such sentence of nullity, when obtained, is to render the marriage null and void, from the beginning as in the case of civil impediments."

Alford, *op. cit.,* pp. 44 f., describes three senses in which the term "voidable" has been used historically. First, in the sense that cases involving certain canonical impediments to marriage are reserved to the ecclesiastical tribunal. If the ecclesiastical tribunal declares them null on the basis of the existence of these canonical impediments, this decision is recognized in common law. Second, at the present time in the United States it is used to describe certain invalid marriages which may be so declared by a competent court before the death of either party to the marriage. In neither of these two instances is the term "voidable" to be understood as meaning merely "rescindable." Third, there is another sense in which this term is used in some States in which it seems to mean "rescindable," that is, the choice is given either to take up cohabitation or to seek a declaration of nullity.

West Virginia is the only State where the impediment of difference of race seems to be such as to make the attempted marriage "voidable"; and the meaning of the term seems to be that of the second type described by Alford, i.e., actually void but requiring court decision to that effect before the nullity can be legally acted upon. All the other States hold these marriages to be "void," that is, no marriages from the beginning. Only Nevada speaks of them as merely "prohibited," which amounts to an equivalent canonical impeding impediment.

especially in the light of the fact that in almost all the States the courts so interpret them and treat miscegenation as a crime.[30] Only one State, West Virginia, directly states that such marriages shall be "void from the time they are so declared by a decree of nullity." [31] Three States, Alabama, Oklahoma, and Tennessee, have nothing in the statutes concerning the nullity of the marriage. However, from court interpretations it is known that the legislative enactments intend to set up what is equivalent to a canonical diriment impediment; in other words, it nullifies the marriage.[32] Nevada clearly does not want to set up an invalidating impediment to such marriages.[33]

[30] Vernier, *op. cit.*, I, 205.

[31] *West Virginia Code Annotated* (Michie, Sublett, Stedman), 1943, 4701.

[32] *Blake v. Sessions,* 95 Okla. 59. 220 Pacific 876 (Supreme Court of Oklahoma): "The issue in this case is clear cut as to whether or not Myrtle Segro was or could be the legal common law wife of James Grayson. If she was his common law wife, she inherited this undivided one half interest . . . if she was not his common law wife she could not inherit. . . ." Section 7499 of the Oklahoma Compiled Statutes of 1921 says: 'The marriage of any person of African descent as defined by the Constitution of this State, to any person not of African descent, shall be unlawful and is hereby prohibited within this state.'" "Then could James Grayson who was one fourth negro by descent, and Myrtle Segro, whom the only testimony in the case shows to be three fourths Indian blood and one fourth white, legally contract and maintain the marital relation . . ." was the question proposed. The court held: "We believe that the Constitution and statutes are clear in their meaning and that that statute when it says 'the marriage relation shall only be entered into, maintained or abrogated as provided by law' is mandatory, and the decisions hold that any relation attempted to be contracted in violation of the express provisions of law is absolutely void." Again, ". . . it is not necessary that the statute should say that such relations are 'void' or 'null and void' as contended by attorneys for plaintiff. . . ." This case indicates the effect of law that court decisions have in interpreting the law and the customs of the people.

Also: *Locklayer v. Locklayer,* 139 Ala. 57; *Carter v. Montgomery,* 2 Tenn. Chy. (Cooper's) 216, 1875.

[33] *Compiled Laws of Nevada 1929,* 10197, 10198.

Penalties

In all the States there are more or less grave penalties set up against those who violate these laws. In most of the States miscegenation is considered a serious crime and is so treated in the setting up of punishments. At least twenty-six of the States prohibiting interracial marriage have provisions in their law, directly or indirectly, whereby they can punish any minister who officiates at such a marriage.[34]

Status of Children Born to Such Unions

Only one State, Oregon, has explicitly provided for the legitimacy of the offspring of interracial marriages in the law forbidding such marriages. In this State, "the issue of such void marriages shall be deemed legitimate." [35] At the other extreme, at least one State, Florida, in a statute explicitly declares such issue illegitimate.[36] For the most part the children are considered illegitimate. This is implied by the fact that the marriage has already been declared void in the law itself. In the legitimization of children born from such marriages-in-fact there are different practices and degrees of leniency in the various States.[37]

Purpose of the Lawmakers

That these laws wish to eliminate any mixing of the white race with other races through marriage is obvious. However, it is impossible from the mere reading of the laws themselves or the preambles to the Constitutions of the various States to ascertain the ultimate purpose of the laws.[38] This is one of the most important

[34] Consult table in appendix.

[35] *Compiled Laws Annotated 1940,* 9-902, 23-1010, 63-102.

[36] *Florida Statutes Annotated 1941,* 741.11.

[37] Harriet S. Daggett, "Legal Aspects of Amalgamation in Louisiana," *Texas Law Review,* XI (February, 1933), 184: "As to the children of the racial mixture, the court has so far been as lenient as may be in the majority of instances and will probably continue to be."

[38] Cf. *Report of the Commission on Mixed Marriages in South Africa,* p. 30; also preambles to the various constitutions in *The State Constitutions,* Charles Kettleborough, editor (Indianapolis: Bowen, 1918), *passim;* also laws in *loc. cit.,* n. 10, *supra.*

features of a law and will go far in determining the objective validity of the laws as they exist. Does this law, or group of laws, seek to do something that is morally irreproachable? On the surface, considering the laws in relation to the public order, this seems to be the case. The State, through its exercise of the so-called police power, is authorized to maintain public tranquility and peace by using appropriate means.[39] This, it seems, it could justly claim to be doing in the passage of such laws as the anti-miscegenation laws, *on the one condition,* that this is a just and effective way to avoid threatened violence to the parties concerned and others of the minority group. This, however, gives rise to the whole vexing question of social separation of races, for anti-miscegenation laws seem to be the ultimate in racial separation laws.[40] Whether such laws are a just and effective way to avoid threatened civil disorder is a subject to be discussed later. The present purpose is merely to set forth the laws and their background without any comment as to their justification on a moral basis. What is more, it has been pointed out in the preceding chapter that some think entrance upon an interracial marriage apparently without sufficient reason, and under the currently prevailing social disapproval, a seriously imprudent act. The result of this act, it is alleged, is the endangering of the possibility of a future normal, happy, and lasting marital bond. The State seems to consider this an act against the public morals and public welfare. Some States seem to use this reason to legislate against interracial marriage.[41]

[39] *Westchester Railway v. Miles,* 55 Pa. St. 209, the Court said: "The danger to the peace engendered by the feeling of aversion between individuals of different races cannot be denied. . . . However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterwards the breach of peace it may have caused."

[40] Cf. *Yale Law Review,* XXXVI (April 1927), 858 ff.

[41] *State v. Tutty,* 41 Federal 753 (Circuit Court Southern District Georgia, 1890): " 'Where the statutory inhibition relates to matters of form or ceremony, and in some respects to qualifications of the parties it is declared that 'the courts would hold such marriage valid here; but, if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void as *contra bonos mores*'

Are there other purposes that can be ascribed to these laws? Had the lawmakers any other motive than the public good and the preservation of peace in the community? Again, this question cannot be answered from the mere reading of the laws. An investigation of pertinent circumstances may supply an answer to this question. For instance, does the presence of great numbers of the nonwhite groups constitute a threat to the social, economic, and cultural prestige of the white group? [42] This cannot be answered in the affirmative, thereby constituting a reason for the existence of those laws that would fit every case, for in eight of the States having such laws Negroes formed less than one percent of the entire population in 1940.[43] In thirteen of the thirty States having such laws in 1940 less than five percent of the population was Negro.[44] It seems unreasonable to hold the threat of such a negligible minority as the reason for the passage of such stringent laws in those States. In the great southern States where the Negroes do constitute a considerable proportion of the population, perhaps more can be made of this argument. In some southern States the Negro is definitely a threat to the hegemony of the whites. Likewise, in the Far West of the Union where the Mongolian has settled in such numbers as to constitute a serious social and economic threat to the superiority of the whites, a similar argument might be advanced. That it is a valid argument for the passage of such laws is not to be presumed. It will be treated later as an objection to the laws.

Although no longer can any proponent of such legislation seriously advance the reason that "natural" law prohibits interracial

. . ." Here the Federal Circuit Court sustained the validity of the Georgia statute prohibiting interracial marriages in a case where defendants, a white man and colored woman, had been married in the District of Columbia, where such marriages are legal, and subsequently took up residence in Georgia. The Court ruled that the Georgia statute was not in violation of the United States Constitution.

[42] Vernier, *op. cit.*, I, 204, and Konvitz, *op. cit.*, chap. ix, indicate these as possible reasons.

[43] *Sixteenth Census of the United States 1940* (Washington: Government Printing Office, 1943), II, Part I, 54; cf. appendix, *infra.*

[44] *Ibid.*

marriage, nor can the "inferiority" of the hybrid continue to be a reason advanced to justify such laws, nevertheless, this type of reasoning has formed the basis of certain court decisions that have sustained these laws in existence in certain States.[45]

Can it be that these States have legally subscribed to the doctrine of the "natural incompatibility of races" or the "superiority" of the white race? Nowhere in the laws is this doctrine to be found expressly. Nevertheless, there are classical precedents constantly cited in court to support these laws, which indicates that the doctrine of the "incompatibility of races" is present.[46] The "original Jim Crow car case," namely, *Westchester Railway Company v. Miles* (55 Pa. St. 209), decided in 1867, has probably been cited more frequently than any other single precedent.[47] With this in mind, it is well to examine the reasoning of the court:

> The danger to the peace engendered by the feeling of aversion between individuals of different races cannot be denied. It is the fact with which the company must deal. If a Negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterwards the breach of peace it may have caused. . . . The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between white and black races within this state, resulting from natural law or custom, as makes it a reasonable ground for separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one Black and the other White, we know not; but the fact is apparent, and the races distinct, each producing its own kind and following the law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with the natural feelings and instincts which He

[45] Cf. *Westchester Railway Company v. Miles* (55 Pa. St. 209); *Yale Law Review*, XXXVI (April, 1927), 858 ff.

[46] *Ibid.*

[47] Andrew A. Bruce, "Racial Zoning by Private Contract," *Virginia Law Register*, XIII (January, 1928), 528.

> always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and their social amalgamation, which leads to a corruption of races, is as clearly divine as that which imparts to them different natures. The tendency to intimate social intermixture is to amalgamation contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of distribution of men by race and color is as visible in the Providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse and but another to intermarriage.[48]

It may be objected that this is the decision of a northern court, and is not to be taken as an indication of the mind of southern courts. Some extracts from other cases similar to the above and having a direct bearing on the problem of the miscegenation laws will serve to show the trend of thought of other courts.[49]

In the case of *Green v. State* (58 Ala. 190, 195; 1877) the court reasoned:

> And surely there cannot be any tyranny or injustice in requiring both races alike to form this union with those of their own race only, whom God hath joined together by indelible peculiarities which declare that He has made the two races distinct.

Again, in *Pace v. State* (69 Ala. 231, 232; 1881), upholding the constitutionality of the statute which more severely punished adultery when between two persons of different races, the court held:

> Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.

In *State v. Gibson* (36 Ind. 389, 404; 1871), which cited with approval the opinion of the *Westchester Railway Company v.*

[48] *Loc. cit.*

[49] Bruce, *op. cit.*, p. 526.

Miles case, the court quoted this extract from the same opinion:

> The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.

More specifically, the case of *Kinney v. Commonwealth* (71 Va. 858, 869; 1878) held the following:

> The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent — all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

In a very recent case, *Perez and Davis v. Moroney* in California, the attorney for the County Clerk, Moroney, cited the following cases in defense of the anti-miscegenation laws in that district. The latest of these decisions is *Stevens v. U. S.* (146 Fed. 2d 120), decided in 1944. He cites also *State v. Tutty* (41 Fed. 753), decided in 1890 by the United States Circuit Court (sitting as a trial court) for the Southern District of Georgia. The *Tutty* case is the key in the arch of the supposed precedent set up by the respondent.[50]

The Tutty case is either cited by the other decisions upon which the respondent allegedly depends in the case of *Perez and Davis v. Moroney* or reflects the doctrine of the earlier decisions in this group of cases.[51]

Here is an indication of the motivation which prompted an American court of law to validate a Georgia statute like the one in the Perez case in California. In *State v. Tutty* the court held:

> It will thus be seen how clearly recognized and distinctly fixed is the purpose of the state of Georgia to prohibit within its borders, miscegenation, as the result of marriages between

[50] Daniel G. Marshall, *Petitioners' Reply Brief* in *Perez and Davis v. Moroney* (Los Angeles: Meyers Legal Press, 1947), p. 21 (L. A. Number 20305).

[51] *Ibid.*

the white and black races. These statutes have received judicial construction by the supreme court of the state at a period when its judges were widely known, not alone for their conservatism, their devotion to the Constitution of the common country, their broad and tolerant liberality of opinion, but also for their profound learning and conspicuous intellectual power.

In *Scott v. State,* 39 Ga. 321, this decision may be found: Leopold Daniels, a Frenchman, had married Charlotte Scott, a Negro woman. They were indicted for cohabiting, and thus the question arose. Chief Justice Joseph E. Brown pronounced the unanimous opinion of the court. . . . Of the law, Chief Justice Brown makes these observations:

I do not hesitate to say that it was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but it is always productive of deplorable results. Our daily observations show us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race. It is sometimes urged that such marriages should be encouraged for the purpose of elevating the inferior race. The reply is that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.

The court was unanimous that the law was constitutional, and the conviction of the parties was affirmed.

This was also alleged to be the doctrine of *Stevens v. U. S., supra,* decided in 1944.[52]

The above opinions indicate that the doctrine of the "superiority of the white race" exerted at least some influence on the enactment of the anti-miscegenation laws as they exist in this country. The use of common legal precedents by the various States in support of these laws also indicates that this motive may be shared by others.

There remains another reason, less tangible than but just as real as the doctrine of the "superiority of the white race," and that is what is referred to commonly as "race prejudice." It is not nec-

[52] *Loc. cit.*

essarily associated with race hatred, and is not always founded on the doctrine of the "superiority of the white race"; it is more or less institutionalized in the sense that it is the attitude of the dominant race which assigns a definitely lower and relatively fixed social status to the race or minority discriminated against. That this exists, and has influenced race legislation in the United States, only a stranger to this land would deny. Did it have anything to do with the passage of this particular type of legislation, namely, anti-miscegenation legislation? Authorities are not lacking who affirm this. Chester G. Vernier has this to say:

> The chief basis for such legislation is doubtless the social problem raised by the presence of minority racial groups, and by the existence of a varying degree of race prejudice. In states where the racial minority is large, the social problem and the prejudice are apt to be of proportionate importance. Other factors, such as the social and economic history and development of a state, also exert a definite influence in creating racial prejudice and discrimination, one logical result of which is legislation prohibiting miscegenation. . . .[53]

The above seems to apply to certain southern States. As for the States west of the Mississippi, Vernier claims that

> The legislation is motivated by the presence of Mongolians in sufficiently large numbers to interfere seriously with the social and economic structure, as well as by a seemingly inherent prejudice against the yellow race, and a vigorous opposition to their marriage with whites. In the states of the Middle West, South, and East the problem is practically nonexistent and it is therefore easy to understand why intermarriage is not prohibited.[54]

Vernier sums up this observation:

> But racial prejudice, social or ethnological considerations, or the dogma of white superiority have resulted in the prohibition of inter-racial marriages.[55]

In 1939 the Union of South Africa received a report from the officially constituted "Commission on Mixed Marriages in South

[53] Vernier, *op. cit.*, I, 204.
[54] *Ibid.*
[55] *Ibid.*

Africa." [56] By *mixed marriages* in this report is meant the marriages of Europeans with non-Europeans, or, more pointedly, with the colored natives of South Africa. The Commission was set up to investigate the advisability of enacting anti-miscegenation laws in that particular territory. It stated its motives very frankly and made some interesting observations on the situation in the United States where such laws are in force. The report reads:

> It is well known that public opinion in a large part of America has always been as strongly opposed to mixed marriages as it is in South Africa, and yet it was found necessary to legislate there on the subject, probably for the reason that a sentiment of that kind tends to operate feebly, if at all, among the lower strata of the community. Legislation in such cases serves to interpret and express public opinion and to reinforce it by substituting effective sanctions in its place where it has become unheeded and, therefore, to a considerable extent inoperative. It is not pretended that legislation of this kind can be securely based on scientific grounds, for there does not yet appear to be any general consensus of opinion among scientists regarding the biological effect of miscegenation on heredity.[57]

In another place, the Report says:

> The motives which prompted the Americans to legislate — an inherent colour prejudice and dislike for mixed marriages, and a desire to protect the social and economic standards of the white race, — also actuate those who support legislation on the subject in South Africa, but the latter are impelled by a much more cogent motive — the desire to keep the white population intact, as the dominant and ruling race.[58]

The majority of the Commission recommended some sort of anti-miscegenation laws in the Union of South Africa on the basis of the above motives.[59]

In his exhaustive study of the status of the American Negro in the law, Charles S. Mangum, Jr., has this to say:

> Of course it is true that these antipathies may be dissimilar

[56] *Op. cit.*; this Commission was officially set up to investigate the feasibility in South Africa of such enactments as the American anti-miscegenation laws.

[57] *Ibid.*, p. 32.

[58] *Ibid.*, p. 30.

[59] *Ibid.*, p. 37.

in different parts of the nation. The aversion is usually far more prevalent in sections of the country where there are sizeable minorities which threaten the ascendancy of the dominant white race, however trivial the danger may appear to be. In the South such a mass antipathy has as its object the Negro; in the Far West, the Mongolian. There are also antipathies toward the Indian and the Malay, in all probability of a lesser intensity only because persons of these races are relatively few in number and are inferior in economic power and importance. There is also much feeling against the Jews in many, we might say practically all, sections of the country.

Wherever such an antipathy exists, there is of course a tendency to avoid social or semi-social contacts with the objectionable race whenever possible, especially in such an intimate relationship as marriage. This feeling has been responsible for the enactment of laws outlawing interracial marriages and other sex relations.[60]

It has been argued by some that since the prohibitory statutes have not had the effect of retarding racial amalgamation, the wisdom of such a policy might well be questioned because it would prevent the legitimation of the children of this type of illicit union. The proponents of this view fail to realize that the present temper of the southern white man would not tolerate a policy permitting mixed marriages. Any attempt to so change the law would be doomed to failure. In fact such an effort could only have the result of stirring up the racial prejudice of the white man to such fever heat that it would act as a boomerang against the Negroes. The white man in the South has made up his mind that he wants no intermarriage with the Negro, and nothing is going to change this attitude as yet, if ever. In fact, the state of Mississippi has enacted a criminal statute punishing anyone for publishing, printing, or circulating any literature in favor of or urging interracial marriage or social equality.[61]

Race prejudice, then, can be added in as perhaps one of the strongest of the influences favoring anti-miscegenation statutes. In summary, there remain the preservation of public order, protection of public morals, the protection of the economic (especially regarding property succession) and social interests of the dominant whites, the doctrine of the "superiority of the white race," and race

[60] Mangum, *op. cit.*, p. 236.
[61] *Ibid.*, p. 237.

prejudice, as reasons for the laws. The next chapter will be a critique of these laws from the point of view of Catholic moral theology, and these particular motives will be investigated for the sake of determining the moral validity of the anti-miscegenation laws as they exist in the United States of America.

CHAPTER IV

LAWS FORBIDDING INTERRACIAL MARRIAGE AND CATHOLIC MORAL TEACHING

Introductory

A whole train of discriminatory practices has arisen in this country and has been so constructed as to cover practically all the conceivable aspects of life: housing, places to eat, transportation, education, recreation, employment, and citizenship. Many of these practices are illegally discriminatory and may even be blatant injustices. There is absolutely no logic in the attempt to condone unjust discriminatory practices on the claim that they serve to avert the danger of interracial marriage. Even granting the inadvisability of interracial marriage, it is unequivocally contended that no reason could possibly justify the use of *unjust* means to avoid its happening in a community. The present chapter will be an attempt to determine whether one of these means is unjust, namely, the anti-miscegenation statutes as they exist in the United States of America.

Although the blight of race prejudice undeniably exists, on the other hand, there is one influence for good in these United States which has never lost sight of the true worth, common destiny, and essential unity of all men. It is the Catholic Church. This is the Church which has always maintained personal rights when they are threatened by the totalitarian State, be it of racist, imperialistic, or whatever ideology. It is a Church identified with lawful authority when order is threatened by unbridled anarchy. This same Church has been graced with a dazzling array of brilliant thinkers who have set forth her teachings. Unfortunately they have left no legacy specifically on the point in question. Nevertheless, they have enunciated principles in light of which modern problems can be solved. One such brilliant thinker is Francis Suarez whose treatise on law remains till this day the classic work of its kind. Modern theologians and canonists are also safe guides to follow when they

reflect the teaching of the Church in their pages. It is the purpose of this chapter to evaluate the anti-miscegenation laws in such a manner that a safe guide will be set up for the valid contracting of marriages by parties who are concerned that their marriage be valid in the sight of God as well as of men. Neither the constitutionality nor the matter of valid legal construction of these laws is the question here. These are presumed until decisions of the higher courts of the land rule otherwise. In the meantime should these laws be obeyed as valid laws? The answer to this question, heretofore, has not been a simple "yes." Although reasons have been advanced to show that these laws should be respected, there are other factors which have indicated that at times certain classes of persons may be justified in conscience in disregarding them. This chapter will attempt a criticism of these laws from the viewpoint of Catholic moral principles.

The Regulation of Marriage in General

The power to regulate marriage implies legislative, judicial, and coercive power. This power affects marriage both as the making of a contract and as an abiding conjugal union. It is used in a legislative manner when it specifies the form of the contract, when it establishes diriment or impeding impediments, and within certain limits, when it states the causes for the dissolution of the bond or separation from "bed and board." It is exercised judicially in judging of the validity or nullity of the matrimonial contract or in judging of the causes for the dissolution of the bond or separation from "bed and board." The power of regulation is exercised coercively when, for example, it urges the fulfillment of obligations rising out of marriage such as the obligation to support one's family. Since the binding force of a law depends on the competence or authority of the lawmaker it is of great importance to determine who is the rightful authority to legislate on marriage.[1]

[1] Cf. Al. De Smet, *De Sponsalibus et Matrimonio* (4th ed.; Brugis: Beyaert, 1927), n. 409.

Civil Effects of Marriage

There can be no question that the civil authority has jurisdiction in matters regarding the purely civil effects of marriage. This is expressly stated in the Code of Canon Law.[2] The Church thereby admits that the State has a civil and social interest in the marriage contract.[3] She maintains, however, that her own regulations on this subject, her own reqirements for validity, are in accord with the moral laws of nature and divine revelation and are consequently wisely intended to safeguard the civil and social as well as the spiritual welfare of the marrying parties and of all mankind. One of the regulations the State may properly impose is the requirement of the registration of the marriage. Such requirements are necessary for the common good and are therefore morally binding on the persons involved. In this matter the State has authority in its own right because it is treating of things purely temporal and separable from the substance of marriage itself. It is necessary to mention, however, that the Church maintains that none of these conditions is of sufficient import in itself to justify the State's declaring a marriage invalid between baptized persons, in which they have not been fulfilled.[4]

Regulation of Marriage between Baptized Persons

Marriage between two baptized persons is a sacrament of the New Law and the competent authority can be none other than that of the Church.[5]. The same canon of the Code of Canon Law

[2] "Baptizatorum matrimonium regitur jure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus," *loc. cit.*, Canon 1016.

[3] Exinde jam constat legitimam quidam auctoritatem jure pollere atque adeo cogi officio coercendi, impediendi, puniendi turpia conjugia, quae rationi ac naturae adversantur; . . . " Pope Pius XI, Encyclical *Casti connubii, A.A.S.*, XXII, 542.

[4] Cf. John A. Ryan and M. F. X. Millar, *The Church and State* (New York: Macmillan, 1936), pp. 50 ff.; Felix Capello, *De Sacramentis* (Torino: Marietti, 1933), III, n. 69; Peter Card. Gasparri, *De Matrimonio* (Ed. nova; Romae Polyglottis, 1932), n. 236; De Smet, *op. cit.*, nn. 427, 428, 433-37.

[5] Cf. Canon 1016, *C.I.C., supra*, n. 2; also: "Supremae tantum auctori-

which mentions the right of the State over purely civil effects of marriage expresses the principle of ecclesiastical competence, namely, Canon 1016: "The marriage of baptized persons is regulated not only by the Divine Law, but also by Canon Law, with full recognition accorded, however, to the competence of the civil power over the merely civil effects of marriage." It is to be noted also that all men, without exception, are bound by the impediments of the Divine Law be it natural or positive.[6] The Church's legislative authority over the marriage of baptized persons is consonant with the doctrine that the Church alone is the competent teacher who authentically declares when the Divine Law, positive or natural, prohibits or invalidates a marriage.[7] This exclusive teaching power confided to the Church by Christ as part of its supreme magisterial authority extends to all marriages, even of the unbaptized.[8]

What is more, it is certain teaching that the right of the Church touching on the legislation of Christian marriage is an *exclusive* right and that civil power may not constitute impediments of any sort for the marriage of the baptized faithful.[9] This is evident from a review of the Church's teaching on her own competence. For instance, it must be believed on divine faith that the Church has

tatis ecclesiasticae est authentice declarare quandonam jus divinum matrimonium impediat vel dirimat." *C.I.C.*, Canon 1938, §1.

[6] Cf. E. Valton, *"Empechements de Mariage," Dictionnaire de Théologie Catholique* (Paris: Letouzey, 1911), tome 4, col. 2454 (hereafter referred to as *DTC)*.

[7] Canon 1038, §1, cf. *supra,* n. 5.

[8] "Christus Dominus fidei depositum Ecclesiae concredidit ut ipsa, Spiritu Sancto jugiter assistente, doctrinam revelatam sancte custodiret et fideliter exponeret." Canon 1322, §1.

[9] Benedictus H. Merkelbach, *Summa Theologiae Moralis* (3rd ed.; Paris: Desclée, 1938), III, n. 824 et seq.; De Smet, *op. cit.*, n. 411; Gasparri, *op. cit.*, I, n. 234; A. Vermeersch-J. Creusen, *Epitome Juris Canonici* (6th ed.; Rome: Dessain, 1940), II, n. 298; cf. also C. B. Alford, *Jus Matrimoniale Comparatum* (New York: Kenedy, 1938), p. 146; William J. Goldsmith, *Competence of Church and State over Marriage — Disputed Points* (Washington: Catholic University of America Press, 1944), p. 85; John La Farge, *The Race Question and the Negro* (New York: Longmans, Green, 1943), pp. 195 ff.

the right to establish impediments which invalidate and annul certain unions which are prohibited neither by the natural law nor by the positive law of God. Since marriage is a contract of public import and pertains to the general welfare, the legislative authority to whose sphere it belongs can set up conditions upon which depends the validity of the contract. Christ raised marriage to the dignity of a sacrament for Christians, and has entrusted the administration of the sacraments to His Church. Hence, the Church and it alone, has the right to add new conditions to those already prescribed by the Divine Law, either positive or natural law, as conditions may demand. The Council of Trent, Session xxiv, canon 4, has decreed that: "If any one assert that the Church has not the right to establish annulling impediments, or that it has erred in establishing them; let him be anathema." [10] Pope Leo XIII gives reasons for this pronouncement in his Encyclical on *Christian Marriage:*

> Since marriage, then, is holy by its own power, in its own nature, and of itself, it ought not to be regulated and administered by the will of civic rulers, but by the divine authority of the Church, which alone in sacred matters professes the office of teaching. Next, the dignity of the sacrament must be considered; for through addition of the sacrament the marriages of Christians have become far noblest of all matrimonial unions. But to decree and ordain concerning the sacrament is, by the will of Christ Himself, so much a part of the power and duty of the Church, that it is plainly absurd to maintain that even the very smallest fraction of such power has been transferred to the civil ruler.[11]

[10] "Si quis dixerit, Ecclesiam non potuisse constituere impedimenta matrimonium dirimentia vel in iis constituendis errasse: A. S." *Denz.* 974.

[11] "Igitur cum matrimonium sit sua vi, sua natura, sua sponte sacrum, consentaneum est ut regatur ac temperatur non Principum imperio, sed divina auctoritate Ecclesiae, quae rerum dignitas est, cuius accessione matrimonia christianorum evasere longe nobilissima. De sacramentis autem statuere et praecipere ita ex voluntate Christi sola potest et debet Ecclesia, ut absonum sit plane potestatis eius vel minimam partem ad gubernatores rei civilis velle transferre." Pope Leo XIII, Encyclical *Arcanum* (February 10, 1880), *A.S.S.*, XII, 392.

"Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos: A. S." Council of Trent, sess. xxiv, canon 12, *Denz.* 982.

The following errors were condemned by Pope Pius IX in his Bull *Quanta Cura,* the so-called *Syllabus,* December 8, 1864:

> The Church has not the power to establish annulling impediments; but this power belongs to the civil authority, by which existing impediments are to be removed.
>
> The Church in later times began to establish annulling impediments, not by its own right, but by that right which it borrowed from civil authority.
>
> The canons of the Council of Trent, which inflict the censure of excommunication on those who dare deny to the Church the power of establishing annulling impediments, either are not dogmatic, or are to be understood of that power borrowed from the civil authority.
>
> The form of the Council of Trent does not oblige under pain of nullity where the civil law prescribes a different form and wishes matrimony to be valid by the intervention of such new form.[12]

This teaching of the infallible Church is borne out in her discipline as expressed in the Code of Canon Law. Canon 1038 provides that the Supreme Authority of the Church alone has the right to declare authentically in what cases the Divine Law forbids or annuls marriage. It further declares that the same Supreme Authority has the exclusive right to constitute impedient or diriment impediments for baptized persons either by universal or par-

"Causae matrimoniales inter baptizatos jure proprio et exclusivo ad iudicem ecclesiasticum spectant." *C.I.C.,* Canon 1960.

[12] Consult *A.S.S.,* II, 160-76 for the full text of *Quanta cura.* "Ecclesia non habet potestatem impedimenta matrimonium dirimentia inducendi, sed ea potestas civili auctoritati competit, a qua impedimenta exsistentia tollenda sunt." Cf. *Denz.* 1768.

"Ecclesia sequioribus saeculis dirimentia impedimenta inducere coepit, non jure proprio, sed illo jure usa, quod a civili potestate mutuata erat." Cf. *Denz.* 1769.

"Tridentini canones, qui anathematis censuram illis inferunt, qui facultatem impedimenta dirimentia inducendi Ecclesiae negare audeant, vel non sunt dogmatici vel de hac mutuata potestate intelligendi sunt." Cf. *Denz.* 1770.

"Tridentini forma sub infirmitatis poena non obligat, ubi lex civilis aliam formam praestituat et velit hac nova forma interveniente matrimonium valere." Cf. *Denz.* 1771.

ticular law.[13] The implications of this teaching of the Church on the present question of miscegenetic marriages will now be discussed.

Civil Anti-miscegenation Laws and the Baptized

The great Christian legist, Francis Suarez, and theologians commonly, teach that when the justice of a law is called into question the presumption is in favor of the justice of the law until there is moral certainty of its injustice.[14] The presumption is in favor of the lawmaker because he is supposed to be better informed and therefore know reasons for the laws which may be unknown to the subjects. Further, Suarez insists, some subjects might be led to excess in not obeying laws and be encouraged to call other laws into question for very light reasons. The wisdom of this admonition is seen by considering that there are few laws that are enacted by human agents that cannot be questioned more or less seriously by some subject. To suspend the operation of every law that is questioned would lead to chaos and the ultimate ineffectuality of all law.

Nevertheless, this presumption is such that it will yield to proof of the opposite. For this reason, a serious charge of the injustice of these laws can be made as to their being applied to baptized persons, for no law can be just if it is passed by one lacking the proper

[13] "Eidem supremae auctoritati privative ius est alia impedimenta matrimonium impedientia vel dirimentia pro baptizatis constituendi per modum legis sive universalis sive particularis." *C.I.C.*, Canon 1038, §2.

[14] "*In dubio de honestate legis praesumendam esse honestatem, ac proinde servandam, . . .*

"Advertunt autem omnes doctores necessarium esse, ut de injustitia legis certo moraliter constet: nam si res sit dubia, praesumendum est pro legislatore, tum quia habet altius jus et illud possidet, tum etiam quia regitur altiori consilio, et potest habere rationes universales subditis occultis tum etiam quia alias subditi sumerent nimiam licentiam non parendi legibus, quia vix possunt esse tam justae, quin possint ab aliquibus per apparentes rationes in dubium revocari." Franciscus Suarez, *Tractatus de Legibus,* Liber 1, Caput ix, n. 11, in *Opera Omnia,* Carlo Berthon, ed. (Editio nova; Paris: Vivès, 1856), V, 41, n. 11; cf. also Merkelbach, *op. cit.*, I, n. 286; J. Aertnys-C. Damen, *Theologia Moralis* (2 vols.; 14th ed.; Turin: Marietti, 1944), I, n. 157.

authority.[15] This is the case when the State enacts laws, even in all other respects just, which would touch on the reception of the sacraments by its baptized subjects.[16] Thus, these laws will be investigated first from the viewpoint of the State's competence to legislate on matrimony.

Outside of the very limited sphere encompassed by civil effects allowed to the State, the civil power has absolutely no competence over any matters which affect the essentials of setting up or dissolving the marital bond for the baptized. Consequently, as far as the baptized are concerned, these laws are not just laws. They offend against commutative justice because they impose an obligation on baptized persons who are not subjects of the State as to Matrimony. Only the Church founded by Christ and entrusted by Him with authority over *res sacrae* for the baptized can impose laws on baptized persons in matters pertaining to the sacraments.[17]

As a result, *per se* the laws forbidding miscegenetic marriages to baptized persons cannot be binding on these subjects. It makes no difference whether the baptized persons in this instance be Catholic or non-Catholic, for the State is incompetent in both cases. Marriage is a sacrament for all baptized parties if it is rightly entered upon.[18] This is not an unqualified invitation to baptized persons to disregard the laws where they exist, but is merely a restatement of a fundamental principle of jurisdiction, that is, that only the Church has the power to legislate on matrimonial matters for the baptized.

There may be, however, good reasons for urging obedience to

[15] "Secunda est justitia commutativa ad quam spectat, ut legislator non plus praecipiat quam possit, quae justitia est maxime necessaria ad valorem legis; unde si princeps legem ferat pro non sibi subditis, contra justitiam commutativam peccat respectu illorum, etiamsi actum de se honestum et utilem praecipiat." Suarez, *op. cit.*, Liber 1, Caput ix, n. 13.

[16] *Supra*, n. 9.

[17] *C.I.C.*, Canon 1038, §2, *supra*, n. 13.

[18] "Si quis dixerit, matrimonium non esse vere et proprie unum ex septem Legis evangelicae sacramentis, a Christo Domino institutum, sed ab hominibus in Ecclesia inventum, neque gratiam conferre: anathema sit." Council of Trent, sess. xxiv, canon 1, *Denz.* 971.

these laws.[19] In themselves these laws cannot demand the obedience of baptized persons nor can they in any manner cause the nullity of marriage of the baptized when the marriage is otherwise valid. Nullity and validity of marriage as used in this chapter are taken in reference to the Divine Law and not in relation to the civil law. A marriage may conceivably be regarded as null and void by civil law and still be valid beyond question by Divine Law. Nevertheless, charity might impose an obligation of fulfilling the requirements of the laws. Charity might impose an obligation where the non-observance of the law would give rise to scandal, i.e., cause others to sin or be the occasion of their sin by arousing race prejudice. There is even some obligation to avoid pharisaical scandal if it pleases one to classify the arousal of race prejudice as such.[20] The obligation of being circumspect in entering upon marriage in general entails a possible obligation of obeying the laws, at least as far as taking the proper means to insure the legal validity of the marriage. In summarizing what has been indicated thus far, it may be said that *per se* the anti-miscegenation laws wherever they exist do not bind in conscience the baptized by reason of the lack of competence of the State in such matters, nor do they have any effect on the validity of the marriage of the baptized as far as the Divine Law is concerned. *Per accidens* there might be an obligation for the baptized person, at least of charity and prudence, to observe the laws. It is insisted, however, that this is not the same sort of obligation that one has to observe the canonical impediments to marriage set up by Church law. The Church has never enacted nor is there at the present time any canonical impediment to marriage based on race. As a further point, it also has to be held that it is illicit to give the impression to others that the State and not the Church has the right to enact marriage laws for the baptized, or by obedience to the law seriously compromise the com-

[19] "Et ideo multo facilius tunc obligari poterit in casu dubio: imo etiam in casu in quo sit certa injustitia aliquando poterit obligari propter vitandum scandalum: nam hoc vitandum est, etiam cum detrimento temporali, ..." Suarez, *op. cit.*, Liber 1, Caput ix, n. 20.

[20] Arthurus Vermeersch, *Theologiae Moralis* (3rd ed.; Romae: Polyglottis, 1945), II, n. 113.

petence of the Church in this regard.[21] However, since these are prohibitive laws, the occasion may never arise where one would have to disobey the laws for this reason alone.

It is recommended in the case of the baptized that until these laws have been repealed entirely, they do not flaunt the laws, because over and beyond the penalty they might incur and the reasons already enumerated they might also have another obligation to obey the laws. This obligation is the obligation of all citizens to help preserve good order and peace in the community when it is threatened, to the extent of giving up a measure of one's rights to insure the peaceful condition.[22] The more imminent this danger

[21] Cf. Merkelbach, *op. cit.*, III, n. 986.

[22] The Encyclical Letter of Pope Leo XIII, *Quod apostolici muneris* of December 28, 1878, *A.S.S.*, XI, 374, gives the principle applied here. In translation: "Should it, however, happen, at any time, that in the public exercise of authority rulers act rashly and arbitrarily, the teaching of the Catholic Church does not allow subjects to rise against them without further warranty, lest peace and order become more and more disturbed, and Society run the risk of greater detriment. And when things have come to such a pass as to hold out no further hope, she teaches that a remedy is to be sought in the virtue of Christian patience and in urgent prayer to God. But should it please legislators and rulers to enjoin or sanction anything repugnant to the divine and natural law, the dignity and duty of the name of Christian and the Apostolic injunction proclaim that one *ought to obey God rather than men.*" Translation from *The Pope and the People* (London: Catholic Truth Society, 1937), p. 17.

Joannes Chelodi, *Jus Canonicum de Matrimonio* (Vicenza: Anonima, 1947), n. 13 applies this to marriage legislation by the State: "Tamen fuerunt, usque ad haec ultima tempora, canonistae, qui legibus civilibus matrimonium prohibentibus, vim obligandi tribuerent, sive jure proprio sive ex earum canonizatione. At prima sententia omnino sustineri nequit; canonizatio, vero esset utique probanda, minime praesumenda. Ecclesia, in suo foro, nullam rationem civilium vetitorum habet; 'commonet,' aut 'vult et exoptat' ut fideles, ex aliis titulis illa aequae ac praescriptiones quasdam positivas observent ne graviora ipsis vel proli incommoda oriantur dummodo jus divinum ne obstet."

Saint Thomas, *Summa Theologica,* I, IIae, q. 96, a. 4: "Unde tales leges non obligant in foro conscientiae nisi forte propter quod vitandum scandalum vel turbationem; propter quod etiam homo juri suo debet cedere, secundum illud Matth. v. 41: Qui angariaverit te mille passus, vade cum eo alia duo; et qui abstulerit tibi tunicam, da ei et pallium."

of disturbance to the public order, the more serious is this obligation. Where the threat against the public order is especially grave, there may be an especially grave reason for this group and all others to avoid any occasion inciting to disorder.

Regulation of Marriage between a Baptized and an Unbaptized Person

That both the baptized and the unbaptized are subject to the Divine Law follows from what has been said previously in discussing the nature of marriage and its regulation in general. There is, however, no complete agreement among canonists and theologians concerning the competent authority to impose positive law governing the marriage between a baptized and an unbaptized person.[23]

Thus, Gasparri in his 1932 edition holds that, according to Canon Law, if an unbaptized person wishes to contract marriage with a baptized person, the impediments by which the baptized person is affected also hinder marriage with the unbaptized who may be otherwise free from impediments. The immunity of the free unbaptized person is not communicated to the baptized. Likewise, the immunity of a baptized person is not communicated to an unbaptized person bound by an impediment of civil law.[24]

On the other hand, there is a more common opinion that holds that the Church has full authority over such marriages because marriage is a sacred thing *(res sacra)*, and because of the exclusive competence of the Church over such matters for the baptized.[25] This competence is so exclusive that the State may not enact legislation which even indirectly binds the baptized. It is here held, therefore, that difference of race loses its effectiveness as an impediment to marriage when it even indirectly involves a baptized

[23] Gasparri, *op. cit.*, I, n. 256 holds the competence of the State. De Smet, *op. cit.*, nn. 438 ff.; Merkelbach, *op. cit.*, III, nn. 826 f.; Felix Cappello, *Tractatus Canonico-Moralis de Sacramentis*, V, *De Matrimonio* (Torino: Marietti, 1947), n. 67, hold the competence of the Church; Vermeersch-Creusen, *op. cit.*, n. 297.

[24] *Ibid.*; De Smet, *op. cit.*, n. 438.

[25] Merkelbach, *op. cit.*, III, n. 826.

party. This is so because of the lack of proper jurisdiction on the part of the State to legislate on marriage for the baptized even though the marriage itself might be non-sacramental. It seems, therefore, that in such a case the baptized party *per se* is not obliged to observe the law; nor is the unbaptized party by reason of the lack of competence of the civil authority over the marriage. This, from the communication of exemption which seems to be his by virtue of the intervention of the higher authority.[26] *Per accidens* both might be held to obey the laws by virtue of the obligations at least of charity and prudence, and the obligation to help preserve public order, but probably, on the basis of lack of competence of the State, would not be affected by its sanctions with regard to the validity of their marriage.

Regulation of Marriage of the Unbaptized

The regulation of the marriages of the unbaptized according to the currently common opinion is conceded to the State even to the extent of setting up of diriment impediments to the marriage of the unbaptized. In other words, if the laws establishing these invalidating impediments were truly invalidating laws, marriages entered into in contravention of these laws would be invalid if the subjects concerned were unbaptized.[27] The purpose of the present treatment is to ascertain whether these laws are valid laws. The validity of these laws has been questioned on many grounds and especially on that of competence of the State to legislate on such matters. Hence, a review of the discussion of the competence of the State in legislating for the marriages of the unbaptized is in order.

Although the magisterial authority of the Church in propounding the Divine Law concerning marriage extends to all men by virtue of her divine commission to teach all men, nevertheless, her legislative power is such that it does not extend beyond establishing marriage impediments for the baptized.[28] Notwithstanding, the

[26] De Smet, *op. cit.*, n. 433.

[27] *Ibid.*

[28] Cf. Matt. xxviii, 19; also *C.I.C.*, Canon 1038, §2, *supra*, n. 13; also Aliphridus Ottaviani, *Institutiones Iuris Publici Ecclesiastici* (2nd ed.; Civitas Vaticana: Typis Polyglottis Vaticanis, 1935-1936), II, 222-23.

unbaptized are bound by the impediments of the Divine Law, howsoever the knowledge of this law may come to them, be it through the authentic declaration of the Church or some other manner. Canon 12 of the Code of Canon Law makes it clear that the Church does not consider the unbaptized as subjects of purely ecclesiastical law.[29] Therefore, they are not bound by the purely ecclesiastical impediments to marriage.[30]

The situation then becomes this: the unbaptized, not being subject to the Church must either remain under the Divine Law alone, however it is manifested to them, or else be governed by the civil authority which will further determine the Divine Law in particular applications. Which is it to be?

Perrone, an eminent theologian of the last century, in his work in this field held that the State has no competence over the marriages of the unbaptized.[31] He is in accord with Taparelli who held the same view in his treatise on natural law.[32] This view is based on the principle that marriage is a sacred thing even for the unbaptized and is a natural religious contract and not something simply profane.[33] Some who hold this opinion cite Pope Leo XIII's Encyclical *Arcanum* and Pope Benedict XIV's Constitution *Singulari nobis* in support of their opinion. An appeal is made to the anterior rights of the individual against those of the State. The jurisdiction of the State must restrict itself to the external. Such are some of the points they adduce in proof of their contention.[34]

[29] "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi alius jure expresse caveatur." Canon 1038, §2.

[30] Cf. Cappello, *op. cit.*, V, n. 67.

[31] J. Perrone, *Praelectiones Theologicae* (Paris: Leroux, Jouby, 1854), II, n. 149 ff.

[32] P. Luigi Taparelli, *Saggio Teoretico di Diritto Naturale* (2nd ed.; Prato: Giachetti, 1883), II, n. 1547.

[33] Cf. Perrone and Taparelli, *loc. cit., supra,* nn. 31 f.

[34] *Ibid.;* cf. also Gasparri, *op. cit.,* nn. 249 ff. where these arguments are considered at length; also *DTC,* IV, col. 2451.

The second opinion concedes the State the right to legislate over the marriage of the unbaptized who are its subjects. It lists adherents from many older theologians as well as among modern theologians: Saint Alphonsus, Schmalzgrueber, Sanchez, Sylvius, and D'Annibale, Santi, Cavagnis, Gasparri, and DeSmet.[35] This opinion is claimed to be the more probable and is now common among canonists and theologians.[36]

Documents of the Holy See are cited in favor of this opinion.[37] Its supporters also argue from reason: the State ought to be strengthened by all the social means and all the powers necessary for the common good of civil society in the sphere where it does not enter into conflict with the spiritual society which is the Church. In the case of marriage of the unbaptized, the power of establishing diriment impediments as well as impeding impediments is truly needed for the common good of civil society.[38] Some think

[35] Alphonsus M. de Liguori, *Theologia Moralis* (Ed. nova; Romae: Vaticanis, 1905), lib. VI, n. 981; Francis Schmalzgrueber, *Jus Ecclesiasticum Universum* (Rome: Rev. Cam. Apostolicae, 1844), IV, pars I, n. 367; Thomas Sanchez, *Disputationum de Sancto Matrimonii Sacramento* (Genuae: Pavonem, 1602), lib. VIII, disp. 3, n. 2; Sylvius, *Commentarium in Tertiam Partem Sancti Thomae Aquinatis* (Venetiis: Balleomana, 1726), q. LIX, art. 2, p. 550, col. 1; Joseph D'Annibale, *Summula Theologiae Moralis* (Reatae: Salvatoris Trinchi, 1876), III, n. 315; Francisci Santi, *Praelectiones Juris Canonici* (2nd ed.; Ratisbon: Pustet, 1892), lib. IV, n. 103, 34 seqq.; Felix Cavagnis, *Jus Publicum Ecclesiasticum* (Romae: 1883), IV, nn. 176 seqq.; Gasparri, *loc. cit.*, I, n. 240; De Smet, *op. cit.*, nn. 443 seqq.

[36] Vermeersch-Creusen, *op. cit.*, II, n. 298; *DTC*, IV, col. 2451; Gasparri, *op. cit.*, n. 250. Cf. also Merkelbach, *op. cit.*, III, n. 825; De Smet, *op. cit.*, n. 433; Cappello, *op. cit.*, nn. 75 seqq.; Aertnys-Damen, *op. cit.*, II, n. 636; Vermeersch, *op. cit.*, III, n. 697.

[37] S. C. Propaganda Fidei, Responsum, 26 June 1820, in *Collectanea S. C. de Propaganda Fidei* (Romae: Polyglottis, 1907), I, n. 1447; Instruction of the same Congregation, 5 December 1631, *ibid.*, n. 71 was sent out as the opinion of theologians rather than as a decree of the Congregation: "Indi polygami, qui cum omnibus mulieribus suis convertuntur ad fidem et baptizantur, tenetur dimittere omnes uxores praeter primam, quae sola est vera uxor, si in illius matrimonio nullum intervenit impedimentum juris naturalis vel positivi conditi ab eorum Principe."

[38] Cf. De Smet, *op. cit.*, nn. 433 ff.

that the right of the State to legislate for the unbaptized is not from any right proper to itself, but rather comes to it devolutively or by reason of the absence of a religious society having proper authority over things naturally sacred. Nevertheless, DeSmet holds this right to be the State's *per se*.[39]

The question of the anti-miscegenation laws binding the unbaptized, as far as the competence of the State to legislate is concerned, is not so simply resolved as in the case of the baptized. Here, it seems that the State more probably does not suffer any lack of competence. Although this is the more probable opinion today and seems to be common, nevertheless it is presumed that this power is to be reasonably and justly exercised. The seemingly common opinion that the State has competence to set up diriment impediments for the unbaptized will be followed here.[40] On this particular point, the issue is not so much whether or not entrance upon such a marriage is a morally good act, as whether or not the marriage entered upon against an invalidating law is valid before the Divine Law. This being the case, since the State is more probably acting within its proper competence in enacting laws of marriage for the unbaptized it now becomes necessary to investigate the charges that these laws are not valid laws as they actually exist.

The Laws and the Unbaptized

Thus far, it has been held by some that a probable and safe opinion from the standpoint of the unbaptized would seem to be that these laws should be obeyed.[41] This opinion, based for the most part on presumptions, will now be investigated along with the laws as to its validity. This opinion is probably supported from a consideration of the traditional Catholic teaching on the exercise of rightful authority by the State; on the irrelevance of the intention of the lawmaker if the laws are otherwise good and useful;

[39] *Ibid.*, nn. 436-437; cf. also Gasparri, *op. cit.*, nn. 255 f.; *DTC*, IV, col. 2451.

[40] *DTC*, IV, col. 2451; Vermeersch-Creusen, *op. cit.*, n. 298; De Smet, *op. cit.*, n. 433; Cappello, *op. cit.*, V, n. 75.

[41] Cf. Alford, *op. cit.*, p. 146; Goldsmith, *op. cit.*, p. 85.

and on a consideration of some of the objections that are put forward against such laws.

The following evaluation of the laws involves the granting of certain points to their supporters for the sake of argument, but this is in no wise to be understood to be a subscription to the ideals of racism that have been traditionally associated with the laws by many observers. It is merely an attempt to investigate the laws and determine what effect they might have on the setting up of an invalid marriage bond for the unbaptized. The needs of a particular problem, even in this day and age of race-consciousness, do not call for a setting aside of the safe norms that have been the treasure of the Christian tradition for centuries. It is in light of this stream of Christian jurisprudence that these laws are to be judged. The application of these principles in no way constitutes a rejection of the Catholic position of the race question — one of perfect justice and charity for all. It is rather an attempt to introduce factors into the discussion that are not to be overlooked in any Christian analysis of moral problems.

It has been indicated above that the State more probably acts with full competence in enacting legislation governing the marriage of the unbaptized. Although it certainly does not have this same power for the marriages of the baptized, nevertheless it is the common and more probable opinion that the State can set up even invalidating impediments for the marriages of the unbaptized if a just and proportionate reason exists for this type of legislation.

The Intention of the Lawmakers

Before considering whether there are any just and proportionate reasons for these laws, an answer must be given to a very serious objection raised by some who claim that these laws have been inspired by very unworthy motives.[42] These motives have been vari-

[42] Cf. Chapter III, *supra;* Chester G. Vernier, *American Family Laws* (Stanford University, California: Stanford University Press, 1931), I, 204; *Yale Law Review,* XXXVI (April, 1927), 858; *Report of the Commission of Mixed* [*Miscegenetic*] *Marriages in South Africa* (Pretoria: Government Printer, 1939), p. 40; Milton R. Konvitz, *The Alien and the Asiatic in American Law* (Ithaca: Cornell University, 1946), chap. ix;

ously described as racism, race prejudice, the maintenance of the supremacy of the white race in both the social and economic sphere and particularly with regard to property succession. The question is whether the evil or insufficient motive of the legislator would vitiate the legislation if such were the case. On the assumption that this is the case, that is, that these laws were inspired by unworthy motives, of what value are the laws?

Suarez has answered a similar question in his treatise on law.[43]

Louis J. Nau, *Marriage Laws of the Code of Canon Law* (New York: Pustet, 1934), p. 15 where these charges are made by reputable authorities.

[43] "Objectio — *Materia Legis ex se debet esse utilis et commoda communi bono, non ex intentione legislatoris.* — quaeri autem potest circa hanc partem, an oporteat hoc bonum esse intentum intentione operantis, vel intentione ipsius operis, juxta modum loquendi D. Thomae 2. 2. q. 141, art. 6, ad 1. Nam intentio operantis videtur esse extrinseca, et per accidens variari posse, et non pendere ab illa rationem legis: opus autem ipsum ex se non semper fertur ad bonum commune, nisi ab alio referatur, et ideo neque intentio operis videtur necessaria nec sufficiens. Respondeo breviter, ad valorem et substantiam legis solum esse necessarium ut res illa, de qua fertur lex, hoc tempore, hoc loco, in hac gente et communitate sit utilis, et conveniens ad bonum commune illius: haec enim utilitas et commoditas non datur a legislatore, sed supponitur, et ideo quantum ad suum esse, ut sic dicam, non pendet ex intentione legislatoris. Ex quo etiam fit ut talis res ex se debeat esse referibilis in commune bonum: nam omne bonum utile, quatenus tale est, aptum est ordinari in eum finem ad quem est utile, et in hoc sensu necessaria est in praesenti intentione operis, non operantis: ratio clara est, quia etiam si legislator ex odio, verbi gratia, aut ex alio pravo finem legem ferat, si lex ipsa nihilominus in bonum commune cedit, id sufficit ad valorem legis. Quia illa prava intentio est mere personalis, et non redundat in actum, quatenus ad utilitatem communem spectat: sic prava intentio judicis non refert ad valorem sententiae, si non sit contra equitatem ejus: sic etiam prava intentio ministri nihil afficit sacramento, si non sit contra substantiam ejus: ita ergo in praesenti bonum commune in lege ipsa spectandum est, non in extrinseca intentione legislatoris. Quam sententiam optime tradit Augustinus, lib. 1, de Liber. Arbitr., cap. 5, dicens: 'Lex quae tuendi populi causa lata est, nullius libidinis argui potest, si Dei jussu tulit, id est, quod praecepit aeterna justitia, expers omnis libidinis id agere potuit. Si autem ille cum aliqua libidine hoc statuit, non ex eo fit ut ei legi cum libidine obtemperare necesse sit, et quia bona lex, et a non bono ferri potest.' Et infra, optimam rationem indicat, quia licet ille cum libidine legem tulerit, potest illi sine libidine obtemperari." Suarez, *op. cit.*, lib. I, cap. vii, n. 9.

It was asked whether the matter of the law ought to be useful and conducive to the common good in itself or from the intention of the lawmaker. To this, Suarez answered that for the validity of the law it is only necessary that the matter of the law be here and now conducive to the common good, and that this utility and reference to the common good is not given by the lawmaker but is presupposed from the nature of law itself, otherwise the law definitely is not a just law. Therefore, the law with regard to its own validity does not depend on the intention of the lawmaker. It is, however, absolutely necessary that the *matter* of the law be referable to the common good. In this sense, a right intention of the law itself, *intentio operis,* is required, not of the lawmaker, *intentio operantis.* Suarez also wrote that even though the lawmaker enacts laws out of hate, if the laws in themselves have some reference to the common good this suffices for the validity of the laws.[44] The reason for this is that the lawmaker's intention is personal and does not affect the prohibition as it contributes to the common welfare. For example, the depraved intention of a judge does not affect the validity of his judgment if the judgment is not otherwise against equity; the evil intention of the minister of a sacrament does not affect its validity if the evil intention is not against the substance of the sacrament.[45] The intention of the lawmaker, therefore, being extrinsic to the law does not affect its validity if the matter of the law itself is in some way referable to the common good. The effect of the laws themselves *(intentio operis)* will be investigated below. Consequently, even laws passed out of race hatred, or with the intention of maintaining white hegemony, or other unworthy motives may not be vitiated because of the unworthy motives, provided that the laws themselves are in some way effectively conducive to the common good. This latter provision remains to be proved. There is good reason to believe that the matter of the laws themselves is open to question as to its honesty and necessity in relation to the deprivation of such a fundamental human right as marrying the person of one's choice.

[44] *Ibid.*
[45] *Ibid.*

It may be alleged that these laws are conducive to the general welfare in this, that they afford a protection for the institution of marriage and prevent their subjects from entering upon an inadvisable marriage. It is difficult to sustain this point against the practice of the Church throughout the world which allows such marriages to her subjects. In a previous chapter it was pointed out that it would be somewhat incautious to label this type of marriage as generally indiscreet. This was from a consideration of the spiritual needs of the parties as well as from the fact that the undesirable features of this type of marriage may be amply compensated for, as far as the individuals are concerned, by the great benefits of marriage itself to a particular person of one's own choice. The State itself is a means to secure individual welfare, spiritual as well as temporal, in such wise that man is helped on his way to his final destiny, not hindered.

It is granted that the State has the right to legislate on external acts that concern virtuous living, exclusive of what properly belongs to the jurisdiction of the Church, because such legislation may be beneficial to the general welfare of the community. That the State has the right to legislate in this sense is the teaching of Suarez and Saint Thomas. Suarez held in his treatise on law that the State can not only command those things which concern the virtue of justice, but can legislate also on matters that concern all the other virtues and forbid vices contrary to these virtues.[46]

A Federal Court held that this type of marriage was considered by the State to be against public morals:

[46] ". . . illum actum virtutis posse esse materiam legis humanae, qui ad bonum finem talis legis moraliter necessarius, et ad commune bonum valde utilis, et communitati hominum, eorumque ordinariae facultati accommodatus sit: has enim conditiones diximus esse necessarias ad legem, et ideo ab illis etiam sumenda est mensura, seu regula materiae humanae noxia sunt, et cum morali utilitate reipublicae prohiberi possint et puniri. Quando autem vitia non sunt noxia communitati, vel ex rigorosa punitione illorum majora mala timentur, permittenda potius sunt quam cohibenda per leges civiles. Quapropter in particulari ad applicandam hanc regulam necessaria est prudentia legislatoris: neque aliquid aliud certum in hoc puncto dici aut affirmari posse existimo." Suarez, *op. cit.*, lib. III, cap. xii, n. 16.

> Where the statutory inhibition relates to matters of form or ceremony, and in some respects to qualifications of the parties, it is declared that the courts would hold such marriage valid here; but, if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void as *contra bonos mores*.[47]

Since it is eminently doubtful and incautious to assert as a general rule that this type of marriage is indiscreet when judged according to the norms of Christian prudence, the general assumption that these laws have to be enacted to protect the institution of marriage and to prevent imprudent marriages is of doubtful value. An important point in this regard is that if these marriages were *generally* imprudent as they are claimed to be by some, it would seem very strange that the Church does not recognize this danger in her own legislation. In a particular case the Church may advise against such a marriage but does not so legislate.

The State, on the other hand, may concede there is nothing morally wrong in general with this type of marriage, but in the peculiar circumstances which exist in a particular locality insist that they do not enjoy community cooperation and that the offspring are at a disadvantage of a very serious nature. There is much truth to this claim and it would seem to uphold the validity of these laws if it were not for the fact that there are benefits to marriage itself which amply compensate for these disadvantages. These have been investigated in Chapter II.

Another aspect under which these laws have been said to contribute to the general welfare is that of avoiding public disturbances that might possibly arise in a community where these marriages are disapproved. Against this it seems that there are few recorded instances of this type of marriage constituting the main reason for actual disturbances of the peace. This seems to be a very weak presumption. On the other hand, the fact that violence occurs rarely from this source would not in itself vitiate the laws because it may be argued that laws which guard against a common danger bind even when the danger is not imminent in certain in-

[47] *State v. Tutty*, 41 Federal 753 (Circuit Court Southern District Georgia 1890).

dividual cases.[48] That there might be violence if these marriages occurred seems to be a presumption of law. There is some probability that it is warranted.[49] This is not an admission that anti-miscegenation laws are the proper and effective means to avoid the threatened violence. They may possibly be, but this is to be investigated below.

What seems like giving in to "mob rule" and prejudice in the enactment of such laws would not necessarily invalidate the laws if the peace were really threatened. It is granted, those who support the laws might say that "mob rule" and prejudice are unreasonable and are not the proper basis of law. They may claim a parallel situation, however, in the fact that the State has to exercise her police power in the declaration of martial law at times when violence is threatened. This is not necessarily "giving in to mob rule." For example, martial law enacts rigorous curtailments of freedom and is justified only if the community peace is maintained effectively thereby when it is seriously threatened. This is not the same as ordinary circumstances when martial law would not be called for. It is somewhat the same with laws forbidding interracial marriages, it might be argued. In effect, the citizens are required to renounce certain measure of their rights in order to avoid disturbances of the public order.

[48] "Lex fundata in praesumptione periculi vim et effectum suum habet, etiamsi in casu particulari periculum non subsit." J. Aertnys et C. A. Damen, *Theologia Moralis* (14th ed.; Turin: Marietti, 1944), I, n. 165; in ecclesiastical law this principle has been canonized thus: "Leges latae ad praecavendum periculum generale urgent, etiamsi in casu peculiari periculum non adsit." *C.I.C.*, Canon 21.

[49] Consult the report of the President's Committee on Civil Rights, *To Secure These Rights,* Charles E. Wilson, Chairman (New York: Simon and Schuster, 1947), *passim.* Also Westchester Railway Company v. Miles, 55 Pa. St. 209, 1867.

Cf. Gunnar Myrdal, *An American Dilemma* (New York: Harper, 1944); especially chap. xxvii, "Violence and Intimidation," where alleged sex offenses are described as the basis of many acts of violence against the Negro. Myrdal is not too optimistic in predicting that the pattern of violence has changed permanently in sections where the Negro is a large part of the population. Cf. p. 566.

However, the presumption that violence would result from this type of marriage remains a weak presumption in view of the known causes of interracial conflict. Where sexual relations between members of different races have been the cause of such disturbances the relations have been of a criminal nature, either really criminal or imaginatively so. What studies have been made on the causes of race riots fail to list interracial marriage as one of the causes.[50]

It may also be objected that these laws interfere with what has always been considered a matter of private conscience; that they are legislating for the internal forum, and hence are unjust. Those who hold this, point out that such a marriage is a private affair and no concern of anyone else, least of all, the civil authority. On the contrary, marriage is not a matter merely of private conscience; it has a direct bearing on the general welfare. It is a public contract, but what the objection really should have maintained is that there are certain aspects of marriage which pertain only to the individual conscience to determine. Although the State may legislate on externally governable acts, it should not hinder certain acts dictated by a right conscience and in accord with the Divine Positive and Natural Law.[51] Such acts are by their very nature con-

[50] "In 1946 at least six persons in the United States were lynched by mobs. Three of them had not been charged, either by the police or anyone else, with an offense. Of the three that had been charged, one had been accused of stealing a saddle. (The real thieves were discovered after the lynching.) Another was said to have broken into a house. A third was charged with stabbing a man. All were Negroes. During the same year, mobs were prevented from lynching 22 persons of whom 21 were Negroes, 1 white." *To Secure These Rights,* the Report of the President's Committee on Civil Rights (New York: Simon and Schuster, 1947), pp. 20 f.

Carter G. Woodson in "Beginnings of Miscegenation of Whites and Blacks," *Journal of Negro History,* III (1918), 349, mentions riots of 1834, 1838, and 1848 which were supposedly caused in whole or part by interracial marriages. As far as the present writer can ascertain, these instances of violence attributed to interracial marriage are the only recorded instances. And these happened over a century ago.

[51] Suarez, *op. cit.,* ilb. III, cap. xii, n. 7: "*Leges civiles posse praecipere recta in omnibus virtutibus et opposita illis vetare.* — Dico secundo: Leges civiles non solum praecipiunt recta in materia justitiae, sed etiam in

ducive to the general welfare and ordinarily not opposed to it. This objection does not seem to stand, however, in the light of the more probable opinion conceding the right to the State to legislate on marriage for its unbaptized subjects. This right of the State, nevertheless, must be exercised only in comparatively rare instances and for most grave reasons.

Do These Laws Have a Function?

By function is here understood usefulness, in the sense that the laws are not superfluous adjuncts to public opinion which has served as an effective deterrent to these marriages in other parts of the United States where the laws are not in force. The reluctance of the overwhelming majority of people to contract a marriage which does not have the community's cooperation has served to keep these marriages down to a negligible number in sections of the United States where they are legally possible. The statistics for New York State are pointed to as evidence of this by those who would make the objection:

> Further evidence that racial intermarriage laws are largely functionless is gained from a consideration of the rates of interracial marriage in states where the practice is legal. New York State in 1929 had only 2.7 percent of its Negro grooms and 0.8 percent of its Negro brides marrying whites and statistics in this state running back to 1916 indicate little trend in this respect.[52]

A fortiori, it may be further argued, it would seem that public opinion against such marriages would be even stronger in localities where public opinion has been strong enough to enact laws against them. It seems that this same public opinion would be sufficient

materia aliarum virtutum moralium, et similiter vetare possunt vitia contra omnes virtutes. Haec enim duo eamdem semper rationem seu proportionem servant, quia facere bonum et vitare malum partes sunt justitiae non tantum particularis, sed etiam generalis. Haec assertio sumitur ex D. Thoma, q. 96, a. 3, et ubi de lege humana in communi loquitur; praecipue vero id docet propter civilem, nam de canonica nulla poterat esse dubitatio . . ."

[52] Milton L. Barron, *People Who Intermarry* (Syracuse: Syracuse University, 1946), p. 58.

sanction against these marriages without the laws.[53] There is, therefore, good reason to doubt that these laws have a function, in other words, to maintain that they are superfluous and unnecessary.

On the contrary, the basis of this objection is a question of fact. Due to the scarcity of reliable statistics on interracial marriages in this country the doubt cannot be resolved with any certainty. The fact that the laws actually operate in States where they are enacted seems to forestall the full effectiveness of this objection.

In addition to the above charge against them, it seems that certain States have not been particularly energetic in enforcing these laws. Reviewing the status of the laws in Louisiana, Harriet Daggett observes:

> After an examination of every reported case on the topics discussed, of which there are really very few considering the period of time during which the various legal provisions dealing with the situations have existed, it seems obvious that the laws dealing with these racial connections do not have the social importance that is ordinarily assumed.
>
> Considering the number of cases dealing with concubinage, the only situation of the four in which the State is primarily concerned, evidently little attempt is being made to enforce the law. Taking into account the interpretation of the statutes in those cases litigated, the effect is still minimized.
>
> Marriage is definitely prohibited but the cases are evidence that it occurs, and due to the indefinite and hazy criterion set up in regard to a standard by which to measure the presence of color, certainly license would be refused only in very evident cases. Furthermore, it is of concern only to the parties of interest and is attacked but in rare cases for obvious reasons.
>
> In cases of mistake either of law or fact, there is every

[53] Bertram W. Doyle, *The Etiquette of Race Relations in the South* (Chicago: University of Chicago Press, 1937), pp. 152 f., holds that custom is strong enough sanction without the laws. Consult also Chapter I, where the small number of these marriages in the United States is indicated. Barron, *op. cit.*, p. 114, says: "Boston in 1900 had a general racial intermarriage rate of only 4.3 per 1000 marriages. New York State, exclusive of New York City, according to a study of 388,970 marriages in the first three decades of this century, had a racial intermarriage rate of less than 1 per 1000 marriages."

> reason to believe that the court might declare that civil effects would flow.
>
> As to the children of the racial mixture, the court has so far been as lenient as may be in the majority of instances and will probably continue to be.
>
> Despite the apparent face value of the statutes, then, in reality the matter of racial intercourse is wisely left, in a large measure, to the good taste and voluntary desires of the individuals concerned and is a matter recognized actually and practically to be more for social than for legal control.[54]

It is also contended by legal authorities that these laws cannot prevent amalgamation of the races completely because of the difficulty of controlling illicit relationships and because the parties can leave the State to be married.[55] These objections can be made, in some degree, against most State laws. There will always be those who will disregard the laws or leave the State to avoid them. That the laws are not strictly enforced in every State is a charge that is difficult to prove.

The utility of these laws, however, seems to be further diminished when one considers the difficulty of establishing racial identity in cases where the amount of Negro or other prohibited blood is very small. Actually there does seem to be some difficulty in establishing racial identity in these cases, but the difficulty is one of establishing a fact, not of the law. The law is generally very definite in its specification of the proportion of blood placing one under the sanction of the law.

Are These Laws Good Public Policy?

Public policy is here taken as the set of guiding principles that are used by those responsible for the well-being of the State in order to guarantee the general welfare of the people. In such a consideration the public officers must consider the relationship of the laws of the State as they contribute not only to the general welfare of the citizens of their own State, but also the influence of their public policy on relationships with other States of the Union and with foreign nations.

[54] Harriet Daggett, "Legal Aspects of Amalgamation in Louisiana," *Texas Law Review*, XI (February, 1933), 184.

[55] Mangum, *op. cit.*, p. 13.

In a hearing before the Committee on the District of Columbia concerning the passage of legislation forbidding the intermarriage of white and colored persons in the District, which is under Federal jurisdiction, the following question was asked:

> It is proposed in this bill to forbid the marriage or intermarriage of the two races in the District of Columbia, and that does not affect the administration of the law. The question is, is that good public policy or not? [56]

It is significant that the highest lawmaking body of the land rejected these laws on the basis of their not being good public policy.

What is more, there are few States not having these laws that have not considered enacting them since 1920.[57] It is also significant that these laws were rejected in these States also. In many of these States there is a sizable non-white population.

It is difficult to hold that these laws are in consonance with the broad principles of democracy so proudly vaunted in this great land. In an era when other nations are looking to the United States for the good example and guidance in matters of public policy, such laws do seem strange and undesirable.

That other nations do not approve of our policies concerning

[56] Hearing before the Committee on the District of Columbia, "Intermarriage of Whites and Negroes in the District of Columbia and Separate Accommodations in Street Cars for Whites and Negroes in the District of Columbia" (on H. R. 12, H. R. 13, H. R. 274, H. R. 326, H. R. 618, H. R. 715, and H. R. 748, February 11, 1916) (Washington: Government Printing Office, 1916) asked the question: "It is proposed in this bill to forbid the marriage or intermarriage of the two races in the District of Columbia, and that does not affect the administration of the law. The question is, is that good public policy or not?" The bill was not passed.

[57] Milton L. Barron, *People Who Intermarry*, p. 53: "In 1927 and 1928 Senator Cole Blease and Representative Allard H. Gasque of South Carolina collaborated with Senator Caraway of Arkansas in an unsuccessful attempt to have an anti-colored intermarriage law passed for the District of Columbia. During 1927 also, the Ku Klux Klan and others were active in introducing racial intermarriage bills in the legislatures of Connecticut, Maine, Massachusetts, Michigan, New Jersey, and Rhode Island. The bills all died in committee discussions because of the strong opposition of liberal representatives."

minority groups in this country is indicated in the following letter to the Fair Employment Practice Committee, May 8, 1946, from the Honorable Dean Acheson, then acting Secretary of State:

> . . . the existence of discrimination against minority groups in this country has adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, or color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been moved.[58]

In the South American countries where the Negro and the Indian hold many responsible government positions, it is conceivable that the interracial marriage laws in this country may create a very undesirable impression.

Racist Doctrine and the Laws

It seems that a very serious charge of unreasonableness can be made against these laws from the standpoint of their evidencing some of the features of racist doctrine. There is sufficient evidence available that justifies the assertion that these laws are, at least in the court opinions that have sustained them in existence, somewhat racist in doctrine. This cannot be concluded from any explicit inclusion of racist tenets in the laws themselves, although certain

[58] Quoted from *To Secure These Rights*, p. 146.

[59] Cf. State v. Tutty, 41 Fed. 753, cited in Stevens v. U. S., 146 F. (2d), 120 decided in 1944: "It will thus be seen how clearly recognized and distinctly fixed is *the purpose* of the state of Georgia to

court opinions in their wording indicate this may be so.[59] It is indicated by what the laws actually effect *(intentio operis)*. Since the object of an act specifies it, if it can be shown that the actual effect of these laws is the same as the objectives sought by the racist doctrine in general, then some case may be made for these laws being of a racist type.

Racism is a way of thinking that has dogmatized the notion that one ethnic group is condemned by the laws of nature to hereditary inferiority and another group is marked off as hereditarily superior. Its corollary maintains that the hope of civilization is in

prohibit within its borders, miscegenation, as the result of marriages between the white and black races. These statutes have received judicial construction by the supreme court of the state at a period when its judges were widely known, not alone for their conservatism, their devotion to the constitution of the common country, their broad and tolerant liberality of opinion, but also for their profound learning and conspicuous intellectual power."

In Scott v. State, 39 Ga. 321, this decision may be found: Leopold Daniels, a Frenchman, had married Charlotte Scott, a Negro woman. They were indicted for cohabiting, and thus the question arose. Chief Justice Joseph E. Brown pronounced the unanimous opinion of the court. . . . Of the law, Chief Justice Brown makes these observations:

'I do not hesitate to say that it was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but it is always productive of deplorable results. Our daily observations show us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race. It is sometimes urged that such marriages should be encouraged for the purpose of elevating the inferior race. The reply is that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.'

The court was unanimous that the law was constitutional and the conviction of the parties was affirmed."

keeping the one race pure and eliminating in some manner or other the inferior group.[60]

[60] Adolf Hitler, *Mein Kampf,* John Chamberlain, Carlton J. H. Hayes, George N. Shuster, and others, editors (New York: Reynal and Hitchcock, 1939), p. 392: "Just as little as Nature desires a mating between weaker individuals and stronger ones, far less she desires the mixing of a higher race with a lower one, as in this case her entire work of higher breeding, which has perhaps taken hundreds of thousands of years, would tumble at one blow.

Historical experience offers countless proofs of this. It shows with terrible clarity that with any mixing of the blood of the Aryan with lower races the result was the end of the culture-bearer. . . .

The result of any crossing, in brief, is always the following:

(a) Lowering of the standard of the higher race,

(b) Physical and mental regression, and, with it, the beginning of a slowly but steadily progressive lingering illness.

To bring about such a development means nothing less than sinning against the will of the Eternal Creator."

La Civiltà Cattolica, III (1938), 275-78, reports: Sotto il titolo "Il Fascismo e i problemi della razza," il *Giornale d'Italia* (14 luglio) informava che "un gruppo di studiosi fascisti, docenti nelle Università italiane e sotto l'egida de Ministro della Cultura Populare, ha fissato nei seguenti termini quella che è la posizione del Fascismo nei confronti dei problemi della razza: . . .

6. Esiste ormai una pura 'razza Italiana'; questo enunciato non è basato sulla confusione del concetto biologico de razza con il concetto storico-linguistico de popolo e di nazione, ma sulla purissima parentela di sangue che unisce gli italiani di oggi alle generazione che da millenni popolano l'Italia, questa antica purezza di sangue è il più grande titolo di nobilità della nazione italiana."

Sacred Congregation of Seminaries and Universities, 13 Apr., 1938: Bouscaren, *op. cit.,* II, 395-96: "Professors, too must apply themselves with all their resources to borrow from biology, from history, from philosophy, from apologetics, from the juridical and moral sciences, arguments to refute solidly and competently the following indefensible assertions:

1. The human races, by their natural and unchangeable characteristics, are so different that the lowest of them is farther removed from the highest race of men than from the highest species of animal.

2. The vigor of the race and the purity of blood must be preserved by every possible means; whatever conduces to this end is *ipso facto* honorable and licit.

Racism has been condemned by Pope Pius XI in his *Encyclical Mit brennender Sorge* and several of the chief tenets of racism have been listed as teachings to be refuted by the Sacred Congregation of Seminaries and Universities.[61] The official newspaper of the Holy See, *L'Osservatore Romano,* has likewise repudiated prohibitions against interracial marriage based solely on difference of race.[62] Do American laws against interracial marriage fall under

3. From the blood, seat of racial characteristics, all the intellectual and moral qualities of man derive as from their principal source.

4. The essential purpose of education is to develop the characteristics of the race and to inflame souls with a burning love for their own race as for the supreme good.

5. Religion is subject to the law of race and must be adapted to it.

6. The primary source and supreme rule of all juridical order is the racial instinct.

7. Nothing exists but the Cosmos, or Universe, the Living Being; all things, including man, are but different forms of the Universal Living Being, developing in the course of ages.

8. Each man exists only by the State and for the State. Whatever he has in the way of rights derives solely from a concession by the State."

[61] *Mit brennender Sorge, A.A.S.,* XXIX, 147. Husslein, II, 321, gives this translation: "Whoever exalts race, or the people, or the state, or any particular form of state, or the depositories of power, or any other fundamental value of the human community — however necessary and honorable be their function in worldly things — whoever raises these notions above their standard value and divinizes them to an idolatrous level, distorts and perverts an order of the world planned and created by God: he is far from the true faith in God and from the concept of life which that faith upholds."

[62] *L'Osservatore Romano,* numero 265 (14-15 novembre, 1938), 1: Il Decreto Legge approvato dal Consiglio dei Ministri nella seduta del 10 corrente probisce e dichirà nullo ogni e qualsiasi matrimonio tra cittadini italiani di razza ariana e persone appartenenti ad altre razza. Non è ammesa nessuna eccezione; non è prevista alcuna dispensa. Sicchè il contrasto tra la recentissima legge italiana e la legge canonica è evidente. Contrasto che si verifica più difficilmente quando si tratti di matrimoni già colpiti dall' impedimento, cioè dalla prohibizione della Chiesa, la quale, comme si è detto, raramente permette a un cattolico di unirsi in matrimonio con persona non battezzata o con persona battezzata, ma non cattolica.

Ben diverso è invece il caso, qualora si tratti di due cattolici di diversa

this repudiation? If so, it seems that if no other reason, just and sufficient, were advanced for these laws they could not be sustained as reasonable if their basis is solely difference of race.

It is not here contended that mere difference of race is the sole basis claimed for these laws by their supporters, but there are authorities who point to features of these laws that indicate that difference of race and certain racist tenets form the principal basis for the laws. For instance, Chester G. Vernier has written: "But racial prejudice, social or ethnogolical considerations, or the dogma of white superiority have resulted in the prohibition of interracial marriages." [63]

In a comment on these laws, the *Yale Law Review* observed that:

> The wisdom of such legislation may well be questioned; reasons advanced in its favor are largely mythical and seemed based on popular prejudice. They stress the importance of the purity of the races, the inferiority of the cross-breed to either pure race, and the loss to society through intermarriage between members of the "superior" white race and members of the "inferior" negro race.[64]

In the *Report of the Commission on Mixed Marriages in South Africa* the following observation was made:

> The motives which prompted the Americans to legislate — an inherent colour prejudice and dislike for mixed marriages,

razza. E' vero che la Chiesa, sempre madre amorosa, suole sconsigliare ai suoi figli di contrarre nozze che presentino il pericolo di prole minorata ed in questo senso è disposta ad appoggiare, nei limiti del diritto divino, gli sforzi dell'autorità civile tendenti al raggiungimento di tale onestissimo scopo. Sono evidenti le ragioni morali e sociali di tale attegiamento. ***Ma la Chiesa suggerisce, ammonisce, persuade: non impone o proibisce. Quando due fedeli di razza diversa, decisi a contrar matrimonio, si presentano a Lei, liberi da ogni impedimento canonico, la Chiesa non può per il solo fatto della diversità di razza, negare la sua assistenza.*** Lo esige la sua missione sanctificatrice; lo esigono quei diretti che Dio ha data e las Chiesa riconosce indistintamente a tutti i suoi figli. Sicchè su questo puto, una proibizione general e assoluta di matrimonio è in opposizione alla dottrina e alle leggi della Chiesa. (Italics added.)

[63] Chester G. Vernier, *American Family Laws* (Stanford University, California: Stanford University Press, 1931), I, 204.

[64] *Yale Law Review*, XXXVI (April, 1927), 858.

> and a desire to protect the social and economic standards of the white race, — also actuate those who support legislation on the subject in South Africa, but the latter are also impelled by a much more cogent motive — the desire to keep the white population intact, as the dominant ruling race.[65]

Charles S. Mangum in his study of the *Legal Status of the Negro* points out that:

> In approaching a study of the sexual aspects of interracial relations one must remember that a problem of great moment is under consideration. There are a great number of persons in the country who have antipathies toward certain groups of individuals because of their race or color. In no field of jurisprudence is this antipathy more noticeable than in the field of law surrounding the marital status and relations of men and women to one another.[66]

Whatever may be said of the conclusiveness of the evidence presented above, actually these laws of themselves attempt to preserve the "purity of blood" of the white race. The twenty-nine States having such laws forbid other groups from marrying into the white group, but only three States have such laws forbidding certain of these non-white groups from marrying among themselves.[67] Obviously, it is the white group that is "protected."[68] To restrict a basic human right for this purpose alone is not justified. Mere difference of race has already been repudiated as a sufficient reason

[65] *Report of the Commission on Mixed Marriages in South Africa* (Pretoria, South Africa: Government Printer, 1939), p. 30.

[66] Charles S. Mangum, *The Legal Status of the Negro* (Chapel Hill: University of North Carolina Press, 1940), p. 236.

[67] Cf. appendix on laws, *infra*.

[68] Daniel G. Marshall, *Petitioner's Reply Brief in Perez and Davis v. Moroney* (Los Angeles, California: Meyers Legal Press, 1947), pp. 3 f.: "Miscegenation is permitted by the statute. Any miscegenetic combinations of red, black, brown and yellow are permitted. Reds and whites may also intermarry. The racial group with complete liberty is the red. A member of this group may marry any human being. The groups with the next greatest liberty are the black, brown, and the yellow. Members of these groups may marry any human being, except a member of the white group. The group with the least liberty is the white group. The only human beings members of this group may marry are other white persons and red persons." Here Marshall has reference to Section 69 of the Civil Code of California.

for prohibiting interracial marriages by an organ of the Holy See.[69]

Further, it is conceivable that these laws actually contribute to maintaining "white supremacy" by obviating at least one avenue to social equality. Marriage, admittedly, is a social "leveler." It is an intimate social relationship and ordinarily is contracted between social equals. The parties to a marriage once entered upon, have certain equality of rights. Whatever may be claimed for maintaining the social equality or inequality of the minority group, an attempt to justify the deprivation of a fundamental human right exclusively on this score is not reasonable.[70]

Negro or other non-white succession to the property of a white spouse by inheritance is also hindered by the civil effect of the laws nullifying the marriage. Again, nothing is here said about the desirability or undesirability of the minority's becoming property owners in this manner. It is difficult to see any wrong in it, if any.

[69] *L'Osservatore Romano,* 265 (14-15 novembre, 1938), 1.

[70] Gunnar Myrdal, *An American Dilemma, The Negro Problem and Modern Democracy* (New York: Harper, 1944), pp. 590 f.:

"We have already observed that the relative license of white men to have illicit intercourse with Negro women does not extend to formal marriage. The relevant difference between these two types of relations is that the latter, but not the former, does give social status to the Negro woman and does take status away from the white man. For a white woman both legal marriage and illicit relations with Negroes cause her to lose caste. These status concerns are obvious and they are serious enough both in the North and in the South to prevent intermarriage. But as they are functions of the caste apparatus which, in this popular theory, is itself explained as a means of preventing intermarriage, the whole theory becomes largely a logical circle.

"The circular character of this reasoning is enhanced when we realize that the great majority of non-liberal white Southerners utilize the dread of 'intermarriage' and the theory of 'no social equality' to justify discriminations which have quite other and wider goals than the purity of the white race. Things are defended in the South as means of preserving racial purity which cannot possibly be defended in this way. To this extent we cannot avoid observing that what *white people really want is to keep the Negroes in a lower status.* 'Intermarriage' itself is resented because it would be a supreme indication of 'social equality,' while the rationalization is that 'social equality' is opposed because it would bring intermarriage."

However, it is here insisted that the deprivation or limitation of a fundamental human right to marry according to one's own choice on this basis is not reasonable. Inheritance rights as determined by civil law follow from valid marriages ordinarily. It is a perversion of right order to prevent valid marriages to forestall inheritance.

It may be said, therefore, that since these laws manifest a primary element of a condemned racist doctrine, namely, preservation of "purity of race," they are at a tremendous disadvantage in proving their claim to being just laws. No reasonable justification can be claimed for the deprivation of the fundamental right to marry according to one's own choice merely on the basis of difference of race.[71]

The Laws and Discrimination

Along the same line, the defendants of these laws say that the laws do not discriminate against one group to the advantage of another. Actually, it may be claimed, the law makes the same provisions for whites and other groups excluded from marriage with the whites. It is claimed that over a period of years the legal construction of these laws has been such that they can no longer be attacked on the ground of being partial to the dominant group.[72]

[71] Rt. Rev. Louis J. Nau, *Marriage Laws of the Code* (New York: Pustet, 1933), p. 15:

"Today the purpose of these laws is to protect financially and politically the domination of the whites. It would indeed be difficult to prove that therein lies a reason justifying these laws."

Rt. Rev. Msgr. John A. Ryan, "Black Patterns of White America," *Negro Digest,* I (April, 1943), 29:

"The more vociferous opponents of what they call 'social equality' invariably stress intermarriage as the horrible example and logical outcome. This is false emphasis and misleading inference."

[72] In other words, the prohibitions and sanctions are equally applied to both parties by the law and neither race is discriminated against in this sense. The application of the laws in individual cases may be, and in many cases actually is alleged to be unfair, but this cannot be laid to the laws when they are misapplied. A frequently quoted case is that of *Pace v. Alabama,* 106 U. S. 583 (1882), to indicate the impartiality of the laws in this respect: "The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punish-

Besides, it may be said, there are few laws designed for the public good which do not in some way or other limit the rights of individuals and actually work some hardship on them, but where the general welfare is at stake, the State has the right to demand this sacrifice from the individual if a just cause exists.

On the contrary, it is a peculiar feature of these laws in many States, that they do discriminate against a certain group, namely, the white group. For instance, Daniel G. Marshall makes this astute observation concerning the law as they existed in California:

> Miscegenation is permitted by the statute. Any miscegenetic combinations of red, black, brown and yellow are permitted. Reds and whites may also intermarry. The racial group with complete liberty is the red. A member of this group may marry any human being. The groups with the next greatest liberty are the black, brown, and the yellow. Members of these groups may marry any human being, except a member of the white group. The group with the least liberty is the white group. The only human beings members of this group may marry are other white persons and red persons.[73]

Strictly speaking, therefore, it can be claimed that these laws are discriminatory.

Those who support these laws may claim also that the State cannot be restricted to legislating merely what is prohibited or permitted by Divine Law. It must never violate it, but the State is not limited in matter exclusively to what is the content matter of the Natural and Divine Positive Law. They may contend that the State may further determine these laws and may proscribe matters considered indifferent in reference to them. Whatever it

ment provided for the offense for which plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribed, generally, a punishment for an offense committed between persons of different sexes; the other prescribed a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. . . . Section 4189 applies the same punishment to both offenders, the white and the black."

[73] Marshall, *op. cit.*, p. 4.

does legislate, however, must be referred to the common welfare in some way.[74] Entrance upon an interracial marriage is *per se* the exercise of a natural right and when prudently exercised is morally unimpeachable. Further, the State does not seem to be depriving the individual of a natural right to marry, but merely to be limiting it. The Church does the same thing in making ecclesiastical impediments. In effect, the State says that this right, prudently and reasonably exercised, does not include marriage into one particular racial group.

It may be claimed that due to the unbalanced sex-ratio (number of males per 100 females) among certain groups included in these anti-miscegenation statutes this limitation of the right to marry outside one's own racial group amounts practically to a total deprivation of the right to marry for the superfluous male population of the particular minority group. The Mongolians and Malayans would seem to be affected in this manner because they are a predominantly male group in this country.[75] It has to be admitted that in several localities where these laws are in force against these particular groups this seems to be the case, i.e., that the right to marry is totally removed in the case of the superfluous population of either sex. However, those who support these laws might say it just appears to be taken away totally but actually and *per se* is not. In this regard, the restriction just forbids members of other races to marry a white person; it does not forbid them to marry a member of a race other than white. If in a particular city or county where the sex-ratio of all groups is unbalanced there is

[74] "Lex autem ordinatur ad bonum commune; et ideo nulla virtus est de cujus actibus lex praecipere non possit. Non tamen de omnibus actibus omnium virtutum lex humana praecipit, sed solum de illis qui ordinabiles sunt ad bonum commune, vel immediate, sicut cum aliqua directe propter bonum commune fiunt: vel mediate, sicut cum aliqua ordinantur a legislatore pertinentia ad bonam disciplinam, per quam cives informantur, ut commune bonum justitiae et pacis conservent." Saint Thomas Aquinas, *Summa Theologica,* I, IIae, q. 96, a. 3.

[75] *The Sixteenth Census of the United States, 1940* (Washington: Government Printing Office, 1943), II, part 1, 19, gives the following sex-ratio (number of males per 100 females) for the Chinese in the United States as 285.3 and of the Japanese as 130.9.

usually no restriction upon seeking a mate from another locality providing he or she is not of the prohibited group. It is not proved beyond question that the right to marry is totally taken away in the case of the groups mentioned. This limitation would be permissible if there is sufficient justification for the laws otherwise.[76]

Dissolving the Marriage Bond

Even the Church must forego any and every attempt to dissolve the bond of a ratified (sacramental) marriage, once such a valid union has been consummated.[77] The State has no authority to void the sacramental union once it has been validly contracted.[78] It has no authority over the bond of matrimony once it has been set up. Divorce, according to the civil law, has not the least power to dissolve the matrimonial contract validly concluded by members of the Church. Nor can the Church acknowledge a right of the State

[76] Suarez, *op. cit.*, lib. I, cap. vii, n. 16: "An lex generalis lata ea intentione ut noceat particulari sit unjusta et invalida. — Quaeri vero hic solet an lex lata sub forma generali, ea intentione, aut dolo ut cedat in praejudicium singularis personae, injusta sit, vel invalida. Nam juristae dicere solent, adeo esse umquam talem legem, ut ab illa liceat appellare, vel exceptionem doli contra illam ponere, . . . Non sentiunt tamen hi auctores talem legem semper invalidam aut injustam: nam sine dubio potest interdum fieri ex rationabili causa, permittendo potius damnum privatum propter commune bonum, quam illud intendendo, vel etiam illud intendendum in poenam justam, vel si contingat intendi inique, a ferente legem ex odio privato, non nocebit ipsi legi, nec justitiae ejus, ut supra dictum est, si alias ipsa sit necessaria ad commune bona. . . . Loquuntur ergo dicti auctores, quando damnum tertii sine justa causa sub specie communis legis procuratur: tunc enim clara est injustitia: et consequenter est etiam licita et debita conveniens defensio, de qua ipsi tractant, quia ad ipsos proprie pertinet."

[77] "Essentiales matrimonii proprietates sunt unitas ac indissolubilitas, quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti." *C.I.C.*, Canon 1013, §2; "Matrimonium validum ratum et consummatum nulla humana potestate nullaque causa praeterquam morte, dissolvi potest." Canon 1118; cf. Matt. xix, 6.

[78] "Quapropter nec ratione efficitur, nec teste temporum historiae comprobatur potestatem in matrimonia christianorum ad principes reipublicae esse jure traductam." Pope Leo XIII, *op. cit.*, *A.S.S.*, XII, 394.

to void the marital bond between baptized persons on the basis of race.[79] The same holds for marriage between the unbaptized, a sacred thing in the natural order. Civil courts have no right to dissolve it.[80] However, the State does have the right to declare a marriage null and void in "determined circumstances" when it is justly so, and this declaration will be recognized by the Church.[81] An example of this would be the declaration of nullity on the grounds of lack of consent of the parties involved. This is assuming, of course, that the State is acting on a case within its proper jurisdiction. It must be mentioned, however, that where there would be no question of the validity of the marriage from the beginning, no declaration of a civil court could possibly dissolve any valid marriage bond.

Another Evaluation of the Laws

It was stated that, as a general principle, laws must be obeyed when their justice is questioned until the subject is certain that the laws are unjust. Having considered the inadequacy of the opinion sustaining the validity of these laws, it is the conviction of the present writer that the laws which forbid interracial marriage in the various States of the United States are certainly unjust. Hence,

[79] H. A. Rommen, *The State in Catholic Thought* (St. Louis: Herder, 1945), p. 574.

[80] Cf. De Smet, *op. cit.*, nn. 310-13.

[81] "A second object which throws into bold relief the difference between the judicial procedures of Church and State is *Marriage*. Because the Creator has willed it to be, marriage is a *res sacra*, a sacred thing. For this reason, the marriage of baptized persons, by its very nature, remains outside the sphere of civil authority. But even where the parties are not baptized, marriage legitimately contracted is a sacred thing in the natural order. The civil courts, therefore, have no power to dissolve it, and the Church has never recognized the validity of divorce decrees in such cases. This does not mean that in determined circumstances an outright declaration of the nullity of the marriage itself — a judgment relatively rare compared with decrees of divorce — may not be justly pronounced by the civil courts, and recognized accordingly by the Church." Pope Pius XII, "On Faith and Marriage" (an address to members of the Rota, 6 October, 1946), translated by J. E. Coffey, *Catholic Mind*, XLV (March, 1947), n. 1011.

it would follow that the laws as such need not be obeyed in conscience and that marriages contracted in contravention of these laws, everything else being conducive to validity, are valid marriages.

Moral certitude for the above statement seems to follow from the following considerations: (1) There is no equitable proportion between the good effect that may be claimed for these laws and the loss of benefits to the individual and society arising from the deprivation of the fundamental human right to marry the person of one's own choice which results. (2) Further, the laws have not only failed to achieve their main objective, i.e., the prevention of mixture of races, but have encouraged concubinage, deprived many persons of the opportunity to enjoy the legal and property rights which would follow from the marriage contract had they been allowed to form it, and have perpetuated interracial conflict. (3) Other reasons advanced as justification for these laws are inadequate. (4) The ultimate basis of these laws, mere difference of race, is contrary to Christian teaching on such matters.

There is no equitable proportion between the good effect that may be claimed for these laws and the loss of benefits to the individual and society arising from the deprivation of the fundamental human right to marry the person of one's own choice which results. If the desired effect of the laws is the advantage of any one group, e.g., the white group, this advantage is not a common good. Laws demand some reference to the *common* good, not merely to the good of a particular racial group. If the effect is the preservation of public order through the avoidance of racial disturbances, this is a common good. But it is a common good that rests on such weak presumptions that it is practically baseless. There are one or two recorded instances in the last one hundred and fifty years when interracial marriage is alleged to be the cause of the disturbance.[82]

[82] These few cases are reported in Carter G. Woodson's "Beginnings of Miscegenation of Whites and Blacks," *Journal of Negro History*, III (1918), 335-53. Cf. also Harriet Daggett, *op. cit.*, p. 184, for confirmation in her description of the liberal attitude in Louisiana. In most of the legal cases

If these laws are designed to promote public order arising from racial sources they seem to be somewhat superfluous and exceedingly severe adjuncts to public opinion which would be sufficient deterrent, and has proved to be sufficient deterrent to such marriages even in such States where they have been allowed by law. It is violence and unreasonable public opinion that should be restrained, not fundamental human rights when they are opposed by mob disapproval. These doubtful benefits of anti-miscegenetic laws are not equitably proportional to the loss of benefits to the individual and society arising from the exercise of the right to marry the person of one's choice. These benefits have been enumerated at length in Chapter II.

If the effect of these laws is claimed to be the protection of the rights of others, this is an unfounded claim. Race is not the basis of natural rights nor can it be the basis for the deprivation of natural rights. Neither cephalic index nor pigmentary characteristics vest men with rights. Human rights are founded in the human person and his needs, not in some accidental difference among men, not in race. A person does not have rights because he is a white man, yellow man, or black man. He has rights because he is a *person,* a rational being, a spiritual as well as corporeal entity with an ultimate destiny. The free exercise of rights is necessary if man is to achieve his ultimate destiny for the simple reason that rights are founded in the needs of the person. No whimsical or pretended motivation of the State is sufficient reason for depriving any person or group of persons of the fundamental personal right to marry the person of his or her own choice.

These laws have failed to achieve their main objective, i.e., to prevent the mixture of races, but have encouraged concubinage, deprived many persons of the opportunity to enjoy the legal and property rights which would follow from the marriage contract

reviewed by the present writer, property rights, and not the imminence of public disorder seemed to be the point at issue. What is referred to as "concubinage" in States where these laws are in force may well have been an attempt on the part of an interracial couple to set up a stable form of married life despite the law.

had they been allowed to form it, and have perpetuated interracial conflict. A large percentage of Negroes shows traces of white ancestry. One reputable scientist, Herskovits, has shown that about seventy per cent of Negroes manifest mixture with whites. The great number of mulattoes in this country is evidence of liaison. Since legitimate marriage is not possible in many States, this argues concubinage of some sort.[83] These laws have deprived the nonwhite consorts of the opportunity to enjoy the legal and property rights which would follow from the marriage contract had they been allowed to form it. At the same time the laws have left them without hope of validating their illicit unions civilly. In theory, these laws are allegedly impartial; in fact, because of the white man's social and economic advantage, they are not impartial, but throw the burden of illegitimacy upon the minority racial group. The laws have perpetuated interracial conflict because they have implicitly denied that that social equality exists which is the basis of marriage and all other social intercourse.

Other reasons advanced for the justification of these laws are inadequate. The presumption that these marriages are generally indiscreet or imprudent is not a valid presumption. This has been demonstrated in Chapter II. The argument that these marriages do not have community cooperation and are therefore to be discouraged is circular reasoning and begs the question. It is precisely the duty of the State to guarantee the exercise of personal rights when these rights are unreasonably infringed by others. Interference based on race prejudice is not reasonable interference.

[83] *Yale Law Review,* XXXVI (April, 1927), 862, expressly confirms this. Cf. Myrdal, *op. cit.,* pp. 123-29, 1210, for a discussion of studies made on the extent of the mixture of races, licit and illicit, since the time of Slavery. Young, *op. cit.,* p. 411, writes: "In every state in the Union there is public opposition adequate to keep marriages between white and colored people at a biologically unimportant minimum regardless of the law, but there is no state which has developed a public sentiment against illicit race mixture sufficient to prevent extensive miscegenation." However insignificant the number of cases of concubinage or other illicit relations is at the present time (although the fact is not to be denied), the great number of mulattoes in this country is proof that at least in the past illicit relations were carried on without much hindrance from the State, if any.

That a racial group has the right to protect its "purity" is not a sufficiently valid reason to deprive the individual of the fundamental human right to marry the person of his own choice. This latter right is a natural right of the person; the right of a racial group to maintain its racial "purity," or for that matter any other right based on the premise of racial solidarity, is at most a conventional right. Although race has some foundation in objective fact, nevertheless, the actual delineation and classification of races has not yet been effected by a universal natural criterion. Besides, race as such creates no natural rights.

That there will be serious disadvantage to the offspring is perhaps the most reasonable basis for these laws. Children are entitled to a happy family life in which they can be properly educated and reared to meet adult problems. And parents have the obligation to provide these advantages. Likewise, those about to enter marriage should weigh this obligation seriously. Nevertheless, the rights of children yet unconceived are not yet rights in the strict sense and hence cannot prevail over the right that one has to marry the person of one's own choice.

That these laws are good public policy has been denied in effect by the refusal of eighteen States and the Federal government to adopt similar enactments. They are a detriment also to good foreign relations. California has recently declared her law against such marriages unconstitutional. This decision of October 1, 1948, is extremely interesting in that it forms the basis of a presumption that similar laws in other States may also fall into the same category of unconstitutional laws, that is, unless the decision of the California Supreme Court is reversed by a decision of the Supreme Court of the United States.

The ultimate basis of these laws, mere difference of race alone, in itself is contrary to Christian teaching on such matters. Christianity preaches the essential equality of all men. These laws forbid without a just and proportionate reason one form of social intercourse that is a manifestation of this essential equality of all men regardless of race. The Holy Roman Catholic Church has never prohibited her subjects from entering upon such marriages. Where such prohibitions have existed, she has deplored them and

maintained that mere difference of race alone cannot justly form the basis of such a general prohibition.

Unconstitutionality of the Law Against Miscegenation in California

On October 28th, 1948, the Supreme Court of the State of California denied the petition for rehearing of the respondent in PEREZ, et al., Petitioners vs. LIPPOLD, etc., Respondent, 32 Advance California Reports 757, decided October 1st, 1948, holding Sections 60 and 69 of the Civil Code of the State of California prohibiting marriages between white persons and members of certain racial groups invalid, as violative of the equal protection clause of the federal Constitution and as being too vague and uncertain to constitute a valid regulation.

In denying this petition the Court was divided 4-3, as in the opinion filed October 1st, 1948.

This decision is now final so far as the state courts of California are concerned and can only be reversed by the United States Supreme Court. The respondent is not carrying the case to the latter court.

Mr. Daniel G. Marshall, an outstanding lawyer of Los Angeles, was attorney for the petitioners, Andrea D. Perez, a white woman, and Sylvester S. Davis, Jr., a Negro. Both petitioners are Catholics. Mr. Marshall is a leader in the Los Angeles Catholic Interracial Council.

The majority opinion manifests an adherence to principles similar to those set forth in the present dissertation. They are worth repeating here, for they support the personal opinion of the present writer concerning this type of law. Since the petitioners are both Catholics they contended that the laws interfered with the practice of their religion. They maintained that since the Church has no rule forbidding an interracial marriage, they were entitled to receive the sacrament of Matrimony. The court, while admitting that the State has the right to legislate on certain aspects of marriage, nevertheless, made the following distinctions:

If the miscegenation law under attack in the present proceeding is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon the conduct of particular religious groups. If, on the other hand, the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well.

The due process clause of the Fourteenth Amendment protects an area of personal liberty not yet wholly delimited. "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without a doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry,* establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Italics added; *Meyer v. Nebraska,* 262 U. S. 390.) Marriage is thus something more than a civil contract subject to the regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means.[84]

The court held the following principles:

1. The right to marry is the right of individuals, not of racial groups.[85]

2. The right to marry is the right to marry the person of one's own choice:

> Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without

[84] 32 *Advance California Reports* 759.
[85] *Ibid.,* p. 762.

violating the equal protection clause of the United States Constitution.[86]

Again:

> Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry.[87]
>
> A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them interchangeable as trains.[88]

3. Consequently, there can be no prohibition of marriage except for an important social objective and by means that are reasonable.[89]

> In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups.[90]

4. There is a strong presumption in law against the validity of laws based on race:

> Race restrictions must be viewed with great suspicion, for the Fourteenth Amendment "was adopted to prevent state legislation designed to discriminate on the basis of race or color." *(Railway Main Ass'n. v. Corsi,* 326 U. S. 88, 94, etc.); and expresses a "definite national policy against discriminations because of race or color." *(James v. Marinship Corp.,* 25 Ca. 2d 721, etc.) Any state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption inherent in this constitutional policy.[91]

The court sought for exceptional circumstances to justify these laws and could find none. For instance, on physical grounds:

> The miscegenation statute, however, condemns certain races as unfit to marry with Caucasians on the premise of a hypothetical racial disability, regardless of the physical quali-

[86] *Ibid.,* p. 761.
[87] *Ibid.,* p. 763.
[88] *Ibid.,* p. 771.
[89] *Ibid.,* p. 760.
[90] *Ibid.,* p. 762.
[91] *Ibid.,* p. 764.

fications of the individuals concerned. If this premise were carried to its logical conclusion, non-Caucasians who are now precluded from marrying Caucasians on physical grounds would also be precluded from marrying among themselves on the same grounds. The concern to prevent marriages in the first category and the indifference about marriages in the second reveal the spuriousness of the contention that intermarriage between Caucasians and non-Caucasians is socially dangerous on physical grounds.[92]

On mental grounds:

> If respondent's blanket condemnation of the mental ability of the proscribed races were accepted, there would be no limit to discriminations based upon the purported inferiority of certain races. It would then be logical to forbid Negroes to marry Negroes, or Mongolians to marry Mongolians, on the grounds of mental inferiority, or by sterilization to decrease their numbers.[93]

On sociological grounds:

> Respondent contends, however, that persons wishing to marry in contravention of race barriers come from the "dregs of society," and that their progeny will therefore be a burden on the community. There is no law forbidding marriage among the "dregs of society," assuming that this expression is capable of definition. If there were such a law, it could not be applied without a proper determination of the persons that fall within that category, a determination that could hardly be made on the basis of race alone.[94]

On the basis of preventing racial tension; *note also the point made concerning the impossibility of redress in the matter of limiting the choice of a marriage partner:*

> The effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice. It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension. Nor can any reliance

[92] *Ibid.*, p. 769.
[93] *Ibid.*, p. 770.
[94] *Ibid.*, p. 770.

be placed on the decisions of the United States Supreme Court upholding laws requiring segregation of races in facilities supplied by local common carriers and schools, for that court has made it clear that in those instances the state must secure equal facilities for all persons regardless of race in order that no substantive right be impaired. In the present case, however, there is no redress for the serious restriction of the right of Negroes, mulattoes, Mongolians and Malays to marry; certainly there is none in the corresponding restriction of the right of Caucasians to marry. A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable.[95]

On the basis of harm to the progeny:

If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground.[96]

The laws are vague and uncertain:

Even if a state could restrict the right to marry upon the basis of race alone, sections 60 and 69 of the Civil Code are nevertheless invalid because they are too vague and uncertain to constitute a valid regulation. A certain precision is essential in a statute regulating a fundamental right.[97]

The laws contribute nothing to public order:

Some of the statutes of the type here under attack have been upheld as reasonably designed to prevent race rioting. The fact that this court grants recognition to foreign miscegenous marriages, valid where contracted, is enough to rebut that argument. Riots would either follow in both cases or in none.[98]

The laws are open to attack, for:

In this case, there are no decisions of either this court or the Supreme Court of the United States which uphold the validity of a statute forbidding or invalidating miscegenous marriages.[99]

[95] *Ibid.*, p. 771.
[96] *Ibid.*, p. 772.
[97] *Ibid.*, p. 773.
[98] *Ibid.*, p. 783.
[99] *Ibid.*, p. 782.

The laws are an expression of prejudice and intolerance:

> It is, of course, conceded that the state in the exercise of the police power may legislate for the protection of the health and welfare of the people and in so doing may infringe to *some* extent on the rights of individuals. But it is not conceded that a state may legislate to the detriment of a class — a minority who are unable to protect themselves, when such legislation has no valid purpose behind it. Nor may the police power be used as a guise to cloak prejudice and intolerance. Prejudice and intolerance are the cancers of civilization.[100]

The majority of the court, the Honorables J. Trainor, C. J. Gibson, J. Carter, and J. Edmonds, showed an insight into the dignity of the human person and the intrinsic worth of individual rights that is reassuring in an age of apparent disregard for inviolable personal rights. Mr. Daniel G. Marshall, likewise, has done an invaluable service to the cause of interracial justice in his masterful pleading of the case.

The opinion which supports the laws against interracial marriage is open to many serious objections. Not all of these objections have been answered satisfactorily. Consequently, it is the conviction of this writer that the laws which forbid interracial marriage in the various States of the United States are certainly unjust. This conviction is based on a review of the many objections that can be brought against these laws and on considerations demanded by a Christian analysis of the laws and their racial background. If the case demands it, therefore, people can act towards these laws as they would towards any other unjust law. This statement, however, in no way vitiates the demands of charity and prudence which may sometimes require the literal observance of a law otherwise not demanded by justice. It is not an open invitation to violate the laws flagrantly where they exist, but is a judgment based on an objective analysis, the practical application of which must be in accord with the virtues of charity and prudence. It is not an unqualified advocacy of miscegenation, but is merely a statement of the transcendency of personal rights in this particular situation. The present writer holds this conviction as a private theologian.

[100] *Ibid.*, p. 782.

Thus, if a case arose involving the bond of an interracial marriage in which the Catholic Church were involved, e.g., in the case of a non-baptized person about to enter the Catholic Church and desiring some authoritative statement on the validity of his interracial marriage contracted in contravention of the State laws, this case should be referred to the judgment of the Holy See.

CHAPTER V

SOME SPECIFIC PROBLEMS

"Passing"

One of the most interesting phenomena accompanying the whole question of the Negro minority is that of what is known as "passing." This is the movement of a steady and sizable stream of persons having "colored" blood to the world of the white man. To have Negro blood and to have this known to the rest of the community is to have oneself relegated to the world of the black man, a cruel world redolent of the low caste associated with former slavery and a world marked off by discrimination. Thus, a significant number of people who have slight amounts of Negro blood and could easily "pass" for white, are ignoring this minimum of Negro blood and throwing in their lot with the white majority.

Estimates vary widely on the extent of this "passing." Most of the figures have been obtained by unreliable means. The most scientific attempts place the figures anywhere from 2000 to 30,000 part-Negroes annually who are sufficiently light in color to "pass." E. W. Eckard in an earnest and scientific study concluded that about 2600 persons of mixed blood pass each year, but that due to errors that could not be avoided he claimed that 2000 a year was nearer the truth.[1] One writer estimated that altogether 110,000 persons had "passed" up to the present day.[2] There are sufficient numbers who "pass" to raise certain problems.

Various questions arise from this practice. First, is there anything wrong with the practice as such? Second, when such a person enters marriage should he tell his intended spouse that he is part-Negro? Third, must the "passer" register himself as a Negro on official lists? Fourth, assuming that he has successfully deceived

[1] E. W. Eckard, "How Many Negroes Pass?" *American Journal of Sociology*, LII (May, 1947), 498-500.

[2] "Passers," *Time*, XLVIII (August 12, 1946), 54.

the State officials and has married a full-blooded white person against the law, what about the validity of the marriage? Would his marriage to a white person be subject to the same rules as were laid down for the marriage of a pure-blooded Negro and white? All other things being equal, if such a "passed" person does not tell the white mate, does this fact affect the validity of the marriage?

Morality of "Passing"

It seems that there is nothing wrong with the practice of "passing" as it seems to be done today. By "passing," a person ordinarily follows the procedure merely of leaving his former company and associating exclusively with whites from then on. It is no crime to have Negro blood; *ordinarily,* it is nobody's business and if a private person is interested merely out of curiosity he has no right to the information. If the person is interested in knowing whether the other person has "passed" in order to apply discriminatory practices, he has still less right to know and may be answered ambiguously or even deceived.[3] This case is similar to one resolved by Saint Alphonsus who speaks of a man who comes from a town incorrectly believed to be pestilent-ridden. This man is asked whether he has come from that particular town. Saint Alphonsus would allow him to deny that he comes from there in the sense that he does not come from the town considered as a pestilent-ridden town. The man is not speaking against the truth as it exists in his mind, nor is he sinning against the rights of the others who

[3] A. Vermeersch, *Theologiae Moralis* (Romae: Gregoriana Universitas, 1945), II, n. 654: "Si contra injustam alterius aggressionem, cum alia copia desit, falsa enuntiatione tuum silentium vel secretum defendas. Etenim, sicuti iniusta alterius aggressio efficit ut actio, quae secus esset homicida, non sit, qua actio, nisi sui defensio, sic etiam causa erit cur verba quae, extra aggressionem prolata, forent mendacia, nunc simul sint defensiva secreti et qua talia tantum intendantur et eligantur. Nec requiritur ut aggrediens conscius sit iniustae suae aggressionis. Nam materialiter iniustus etiam vi repelli potest." Cf. also Aertnys-Damen, *Theologia Moralis* (Turin: Marietti, 1944), I, n. 998; Henry Davis, *Moral and Pastoral Theology* (New York: Sheed and Ward, 1943), II, 415.

feared the pestilence, because actually there was no pestilence in the town.[4] If the question were asked of a "passer" whether or not he is white or Negro he may say that he is white, because he is not a Negro in the sense that deserves the long list of discriminations that would follow from his admission. This would be true even if a civil official (who ordinarily has a strict right to know the truth) asked him for such purposes as voting or being listed on housing registries when the "passer" is certain that gravely unfair discrimination would result. The "passer" has as much right to call himself white as black, for the American mentality does not seem to recognize any "in-between" when it comes to a discriminatory practice. In this case, to require a person who has "passed" to call himself "black" is almost the same as a defendant in court being required to admit guilt to an alleged crime to which there is a heavy penalty. There can be no just penalty where there is no guilt, and all the discriminations against the Negro because of his race have the appearance of penalties without guilt.[5] It cannot be claimed as some have claimed, that this passing is an "escape" device, a desertion, for the person who has passed belongs as much to one race as to the other.[6] If there were more real Christian charity and justice in the world, the subterfuge of "passing" would not be the widespread practice it is today.

[4] Alphonsus Maria De Liguori, *Theologia Moralis* (Ed. nova; Romae: Vaticanis, 1905), I, Lib. III, Tract. II, Cap. II, Dist. IV, n. 159: "Qui venit de loco falso putato infecto, potest negare venire ex illo, scilicet ut *pestilenti;* quia haec est mens custodum."

[5] Aertnys-Damen, *op. cit.*, I, n. 159: "Et satis consonat antiqua regula juris 23 in 6°: 'Sine culpa, nisi subsit causa, non est aliquis puniendus.'"

[6] A. H. Shannon, "Racial Integrity of the American Negro," *Contemporary Review*, CXLIV (November, 1933), 587: "The significance of the situation is not understood generally in either race or, if understood even by the leaders, is habitually ignored . . . the thoughtful, aspiring element of the race have reason to believe that the easiest, if not the only road to permanent and worth-while advancement lies not in racial development but in *escape from race.*" Shannon deplores the large number of mulattoes and especially their effect on the "purity" of the white race. Italics added.

"Passing" and Marriage

Ordinarily, the foregoing seems to cover the general manner of acting when a person who has "passed" is interrogated concerning his racial origins. When this person is contemplating marriage with a white person, however, the obligations are different. A betrothed is a party who certainly has a valid claim to the knowledge concerning the racial antecedents of her marriage partner.[7] This right is based on all that has been said so far about the undesirable circumstances of entering a miscegenetic marriage in this country. Marriage is a social affair and may not run along smoothly unless it has the cooperation of the community in which the family is to reside. Whatever the hue of the skin, if it becomes known that the marriage partner has Negro blood there is a strong presumption that practically the same discriminations are forthcoming against this "passer" as are reserved for Negroes generally. In this country, sad to reflect, possessing one drop of Negro blood (if the phrase can be used) subjects its possessor to the usual discriminatory practices. Hence, the right of the future white spouse to enter a marriage free from extraordinary strains demands consideration. It seems that the "passer" could sin gravely against justice if this were deliberately concealed. The same could be said if he purposely deceived his betrothed concerning this matter.[8] This is a grave obligation on the part of the "passer," especially in those States that have laws against miscegenetic marriages.

From the standpoint of competency, the State is legislating unjustly when it legislates concerning the marriages of baptized

[7] This is also based on the strong presumption that a white person in certain sections of this country would certainly not want to marry a "passer" if it were known to him. The subsequent discovery might involve internal strains on the marriage bond plus what the community might inflict.

[8] A person is bound to exercise care in entering marriage and hence has a right to know the truth about his future spouse. Pope Pius XI, Encyclical *"Casti connubii"* on marriage: "To the proximate preparation of a good married life belongs very specifically the care in choosing a partner; . . ." Translated in Husslein, *Social Wellsprings* (Milwaukee: Bruce, 1942), II, 167.

persons. For this reason marriages of the baptized when entered upon in contravention of the State laws forbidding interracial marriages would still be valid marriages as far as the Catholic Church is concerned. Again, from the standpoint of the competency of the State, it is a more probable opinion that the marriage of an unbaptized person and a baptized person entered upon in contravention of the State laws would be a valid marriage. Since these laws are held to be unjust for all concerned on the basis of what has been written in Chapter IV, it seems that, everything else being conducive to validity, all marriages entered upon in contravention of these laws would be valid marriages before God even though not in the eyes of the civil law.

Assuming, nevertheless, that the "passer" has successfully evaded detection by private citizens and has also evaded the law concerning miscegenetic marriages and has married a white person in a State where the law attempts to nullify the marriage, what is to be said of the validity according to Divine Law of the marriage of these parties if they are unbaptized?[9] Where such marriages exist in fact, should the question of their validity arise, i.e., should one of the parties become a Catholic, they should be referred to the competent authority for an authoritative declaration. In the case of the fully qualified baptized, the Church can vouch for the validity of their marriages even when entered in contravention of purely civil laws, but not so in the case of the unbaptized over whom the Church exercises no direct competence in marriage legislation.[10]

It seems that, all other things being equal, the marriage of a "passer" to a white person would not present the same grave problems as that of a pure Negro to a white person as long as the "passer" remained undetected. However, since there are some undesirable effects attached to entering such a marriage, such as

[9] Cf. *supra*, Chapter IV, where the validity of the laws for the unbaptized is discussed.

[10] *C.I.C.*, Canon 12: "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi aliud jure expresse caveatur."

the possibility of discovery and consequent discrimination, serious thought should be given to this possibility before entering marriage with a "passer." [11]

Another question regarding persons who "pass" is that of "error of person" and its effect on the validity of the marriage. Canon 1083 of the Code of Canon Law would apply both to the baptized and the unbaptized because it merely expresses a principle of natural law to which both are subject, that is, except for the section concerning the marriage of a person with a person who is believed to be free but who is actually a slave. This last provision is ecclesiastical law and does not bind the unbaptized. However, Canon 1083 states that error concerning the identity of the person with whom one wants to contract marriage renders marriage null and void. On the other hand, the Canon continues, error concerning quality, any quality of the person, though such quality caused one to contract marriage, renders marriage invalid only in the following two cases: first, if the error concerning a certain quality amounts to an error in the person; and second, the error concerning the condition of slavery mentioned above.[12] Hence, the only error or mistake admitted by the Church as an invalidating cause of marriage is the error concerning the physical identity of the

[11] "As there are thousands of Negroes whom neither colored nor white people can distinguish from full-blooded whites, it is understandable that in the anonymity of the city many Negroes 'pass for white' daily, both intentionally and unintentionally. But should white people become aware of their remote colored ancestors they would, in all probability, treat them as Negroes." St. C. Drake and H. E. Cayton, *Black Metropolis* (New York: Harcourt, Brace, 1945), p. 159. This is a study of the Negro community in a large northern city.

[12] *C.I.C.*, Canon 1083: 1. Error circa personam invalidum reddit matrimonium.

2. Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum:

1°. Si error qualitatis redundet in errorem personae;

2°. Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta."

person whom one intends to marry. In other words, if a third person substitutes himself and is successful in carrying off the ruse so well that the other party is deceived, there is of course no marriage. This is not the case in the instance where a man who has "passed" does not make this known to his white spouse, because his possession of a small amount of colored blood is not a quality that would substantially affect his identity. Hence, even though a "passer" does deceive concerning his racial antecedents, this deception in itself is not sufficient to invalidate a marriage, for it does not amount to causing an error of person.[13] If a person has made identity of race an express condition to the marriage then the rules

[13] Al. De Smet, *De Sponsalibus et Matrimonio* (4th ed.; Brugis: Beyaert, 1927), n. 525: "Circa qualitatem personae: si est concomitans, non irritat matrimonium; si est antecedens, etiam regulariter et per se non irritat consensum, sed per accidens tantum et exceptionaliter." Cf. *The Rhinelander Case;* Mangum, *Legal Status of the Negro,* p. 255: "The much publicized Rhinelander case from New York involved a white husband's efforts to obtain an annulment of his marriage to a woman who he claimed had Negro blood. He alleged that she had made fraudulent statements to him prior to the marriage that she had no colored blood in her veins. At the trial she failed to take the witness stand and deny that she had made these statements. The lower court decided in her favor, and the husband appealed on the ground that this failure to take the stand in her own defense created a conclusive presumption that she had actually made the alleged statements. The appellate court declared that no such conclusive presumption would arise from her refusal to take the stand in her own behalf, although the natural result of her failure to testify would be to prejudice the jury against her cause. The jury was charged that it might draw such inferences as it wished from the failure to call witnesses."

Cf. *Rhinelander v. Rhinelander,* 219 App. Div. 189, 219 N. Y. Supp. 548 (2nd Dep't., 1927), *aff'd* 245 N. Y. 510, 157 N. E. 838 (1927).

If the facts of a case are that the other party to a marriage is not to possess Negro blood as an *express* condition to the *particular* marriage in question there is a basis for contesting the validity of this marriage if the *express* condition is not fulfilled. On the other hand, if the condition is merely *interpretative,* that is, judged on what *would have been done* if it were known that the other party had Negro blood, there is no basis for contesting the validity of the marriage on this score. An *interpretative* condition does not suffice to invalidate a marriage. Cf. De Smet, *op. cit.,* n. 151.

would be applicable for marriages which are conditioned, but this is not the same as the error discussed above. All such cases should be submitted to the proper ecclesiastical or civil authority for competent adjudication if they should arise.

Should a decree of nullity be issued by a civil court against the miscegenetic marriage of two unbaptized persons contracted in a State where such marriages are forbidden under penalty of invalidity, it seems that such a decree could not safely be recognized by the local ecclesiastical authority and should be referred to the Holy See. The occasion to recognize this decree could arise when one of the unbaptized parties to the aforesaid marriage wishes to marry a Catholic but does not wish to convert, or when one of the unbaptized parties wishes to enter the Church and desires such an authoritative declaration from the Church.[14]

Interracial Marriage and the Pastor

What should the pastor do if two of his subjects desire to enter a miscegenetic marriage? The general answer to this question is an affirmation of Canon Law that they have the right to receive the sacraments, and consequently when they reasonably ask they are not to be denied.[15] Therefore, when the civil law permits it, the pastor has no right to refuse the sacraments to two of his subjects of different races when they are otherwise qualified.[16] They might incur the displeasure of other members of the community by entering such a marriage, but this does not militate against their

[14] Cf. De Smet, *op. cit.*, n. 345.

[15] *C.I.C.*, Canon 87: "Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum juribus et ob officiis, nisi, ad jura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura."

[16] "In nonnullis statibus matrimonia inter homines albi et eos qui nigri sunt coloris lege prohibentur, et irrita habentur. Sed lege Ecclesiae valent, ubicumque non occurat servilis conditionis impedimentum. Si contingat aliquod iniri nequeunt prohiberi sacramentis ob legis vetitum, vel publicam opinionem; nam utuntur jure naturae, Ecclesia haud prohibente." Francis P. Kenrick, *Theologia Moralis* (Philadelphia: Cummiskey, 1843), III, n. 142.

right to receive the sacraments.[17] The Church has not made difference of race an impediment to marriage, neither may others in the Church do so. If the marriage would be such that it would disturb public order in an immediate manner, the pastor should try to dissuade the couple from an immediate marriage or could refer them to the ordinary who could also try to dissuade them.[18] It seems, however, that even the ordinary cannot totally prevent such parties from contracting an interracial marriage.[19] However, the prime consideration in this matter should be not only the public order but also the good of souls.

If the baptized parties ask the assistance of the parish priest, their pastor, in States where the laws against miscegenetic marriages are in force, what course is open to the pastor? The parishioners certainly have the canonical right to receive the sacraments from their pastor or at least be provided for by him in some manner or other.[20] However, in most States that have these laws there are provisions for punishing the minister who assists. The punishment for the ministers in most cases is more severe than for the contracting parties. For instance, California had no penalty against the contracting parties, but a very severe one for the minister who assisted.[21] As far as Canon Law is concerned, the parties are reasonably asking for the sacraments, for Canon Law knows no impediment of mixed-race. Canon Law has foreseen such a circumstance in its provisions contained in Canon 1098 whereby the

[17] Cf. J. J. Heneghan, *The Marriages of Unworthy Catholics* (Washington: Catholic University of America Press, 1944), p. 78.

[18] *C.I.C.*, Canon 1039: "1. Ordinarii locorum omnibus in suo territorio actu commorantibus et suis subditis etiam extra fines sui territorii vetare possunt matrimonia in casu peculiari, sed ad tempus tantum, justa de causa eaque perdurante."

[19] *Ibid.*, note *"sed ad tempus tantum."*

[20] *C.I.C.*, Canon 464: ". . Parochus ex officio tenetur curam animarum exercere in omnes suos paroecianos, qui non sint legitime exempti."

[21] Every authorized officiant knowingly solemnizing any incestuous or other marriage forbidden by law is punishable by fine of from $100 to $1000 or imprisonment of from 3 months to 1 year or both. Cf. Penal Code 359, *Civil Code of California* (Deering), 1941.

parties can minister the sacrament without the pastor's assistance.[22] Although this procedure would guarantee the validity of the marriage as far as the Catholic Church would be concerned, nevertheless it would be fraught with the difficulty of proving a civil marital status. Such being the case, it would seem more prudent to make arrangements for a Catholic marriage outside the State, but the pastor has to be careful that the inter-state marriage reciprocity laws of the State would recognize such a marriage. Many States would not recognize such a marriage unless the parties intended to remain domiciliaries of the territory which permitted the marriage.[23] Where such laws are in existence it seems preferable,

[22] *C.I.C.*, Canon 1098: "Si haberi vel adiri nequeat sine gravi incommodo parochus vel Ordinarius vel sacerdos delegatus qui matrimonio assistant ad normam canonum 1095, 1096:

1°. In mortis periculo validum et licitum est matrimonium contractum coram solis testibus; et etiam extra mortis periculum, dummodo prudenter praevideatur eam rerum conditionem esse per mensem duraturam;

2°. In utroque casu, si praesto sit alius sacerdos qui adesse possit, vocari et, una cum testibus, matrimonio assistere debet, salva coniugii validitate coram solis testibus."

Cf. also De Smet, *op. cit.*, n. 132.

[23] "Some few states have enacted statutes which invalidate all marriages of persons who come to the jurisdiction with the intention of returning to their home state and contract a marriage proscribed by the laws of the latter." C. S. Mangum, *The Legal Status of the Negro* (Chapel Hill: University of North Carolina Press, 1940), pp. 249 f. This same author lists Louisiana among such States having this type of law. That it would be dangerous to presume that a marriage would always be recognized legally as valid when contracted outside of one's own proper State is evident from the statement of the court in the case of *State v. Tutty*, 41 Federal 753 (Circuit Court Southern District Georgia 1890). In this case the Federal Circuit Court sustained validity of the Georgia statute prohibiting interracial marriages in a case where the defendants, a white man and a colored woman, had been married in the District of Columbia, where such marriages were legal, and later took up residence in Georgia. The court held: 'Where the statutory inhibition relates to matters of form or ceremony, and in some respects to qualifications of the parties' it is declared that 'the courts would hold such marriage valid here; but, if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void as *contra bonos mores*.'"

if possible, that the parties take up residence elsewhere if they are determined to pursue the marriage.

Repealing the Laws

For the same reasons that it was judged that these laws are unjust, should these laws be repealed? They are certainly an unjust interference in a realm where the Church is the only authorized legislator for the baptized. It also seems that local custom and the prevailing social disapproval would be sufficient deterrent to such marriages without the sanction of the law as far as the unbaptized are concerned. These considerations, coupled with the conviction of the present writer that these laws are certainly unjust, and that they pose several serious questions of conscience for the unbaptized, indicate to him that these laws should be repealed. It is sincerely hoped that they will be repealed. Nevertheless, it seems that any attempt to repeal them, especially in States where the minority problem is acute, will be doomed to failure if one can judge by the reaction to proposals of legislation for civil rights — a lesser thing in the eyes of the legislators concerned than the repeal of anti-miscegenation legislation. It appears that in the States having these laws where the minority problem is not so acute that it would not only be the wiser but also the just thing to do for all concerned to repeal the laws. If this seems impossible, then the sanctions of the laws should be mitigated at least to allow the recognition of the validity of the marriages.[24]

Interracial Marriage and Discrimination

As a final point on legislation, it must be insisted that the type of legislation that results in segregation cannot find its justification in that it attempts to prevent miscegenation. Miscegenation is not a crime, although the many States have legally made it so. It cannot be said that as a general rule interracial marriage is indiscreet or imprudent. Besides, it is hard to conceive that the mere riding in the same railway coach or the same section of a streetcar would

[24] Cf. *Yale Law Review*, XXXVI (April, 1927), 858 ff., for a criticism of the laws along these lines.

lead to miscegenation. Nor is it justifiable to restrict housing for the Negroes or any other race on the basis of the contention that it prevents miscegenation. Here, the means taken are all out of proportion to the end desired, that is, when one considers the type of housing the minority group is usually assigned to and the present needs of the Negro group. Not to allow a group to move into one neighborhood is very different from preventing their moving out of the miserable slums that have thus far been assigned to them. The latter is never permissible, the former only doubtfully so, and those in authority have a duty in conscience to see that decent housing is provided.[25] It seems that the former practice is now illegal, at least as far as the making of race covenants is concerned. The prevention of miscegenation, however, is not a justifying reason for depriving a group of decent housing. If justification for such laws that enforce segregation is sought, let it be certain that the segregation inflicts no injustice to the parties concerned, that is, if there is such a thing in practice as just segregation. Segregation, then, when it deprives a person of his rights unduly, must be condemned. As it is practiced in many States it is not justified by an appeal to the undesirability of miscegenation.[26]

General Conclusions

1. The Roman Catholic Church in no wise forbids interracial marriage as such.

[25] Father La Farge aptly expresses this in a paragraph: "If the question of intermarriage had any of the relevance to the problem of social justice which it is sometimes assumed to have, it would prove too much. If interracial justice brings intermarriage, then any form of contact between the races is fraught with the same danger. If intermarriages will grow out of such remote causes as admitting Negroes to trade unions or employing Negro stenographers, or allowing Negroes a vote or a voice in the expenditure of public funds, or educating those who possess natural talents, then it will come out of tolerating their presence in the country at all or from baptizing Negro children, or from admitting Negro converts to the Faith." John La Farge, *The Race Question and the Negro* (New York: Longmans, Green, 1945), pp. 198 f.

[26] Francis J. Gilligan, *Morality of the Color Line* (Washington: Catholic University of America Press, 1928), pp. 96 ff., suggests social separation, not unjust segregation, as such a means.

2. The natural right to marry includes also the natural right to marry the person of one's own choice, to marry *this particular person regardless of race.*

3. The exercise of this right involves great benefits to the individual and to society regardless of the undesirable concomitants in many sections of this country. The parties to an interracial marriage may justifiably enter such a marriage to secure these benefits despite the undesirable consequences they may suffer.

4. The entrance upon an interracial marriage is, in itself, a morally good act.

5. Laws forbidding interracial marriage between baptized persons are unjust because of the lack of competence of the State to legislate on such matters for the baptized.

6. Considering the lack of competence of the State to legislate, laws forbidding interracial marriages between a baptized person and an unbaptized person are more probably unjust.

7. It is the conviction of the present writer that the laws in the various States of the United States which forbid interracial marriages are in general unjust.

8. Social legislation based upon the "undesirability" of interracial marriage is based on a false assumption, namely, that these marriages are in general indiscreet and imprudent.

9. These laws should be repealed.

APPENDIX

The following tables were compiled from a variety of sources; the most useful were:

Charles S. Mangum, Jr., *The Legal Status of the Negro.*

Otto Klineberg, *Characteristics of the American Negro.*

Chester G. Vernier, *American Family Laws.*

State Law Index, Reports through 1946, Legislative Reference Service, Library of Congress.

Sixteenth Census of the United States 1940.

Compiled statutes and session laws of the various States through 1947.

C. B. Alford, *Jus Matrimoniale Comparatum.*

Geoffrey May, *Marriage Laws and Decisions in the United States.*

Symbols

1/8N = 1/8 or more Negro blood
N = "any Negro"; no further specification. Courts may interpret this in different ways.
M = Mongolian
Ma = Malayan
I = Indian
VL = void, expressed in law.
VJ = void, but not expressed in the law, but so interpreted by the courts.
Vb = voidable.
NV = prohibited, not void.

Explanation of Penalty

Top line gives fine; lower gives imprisonment; e.g.:
Top line: 100 – 1000 = no less than $100 and no more than $1000.
Lower line: 1 – 5 = 1 to 5 years.
1m – 5 = 1 month to 5 years.
– 10 = not more than 10 years.
– 30d = not more than 30 days.
1 – = not less than one year.

* Diriment — No valid marriage possible in civil law.
** Impeding — Marriage valid but illicit in civil law.

TABLE I

Racial Restrictions on Choice of Marriage Partner
Legal Status by States

State	Partner prohibited to white person	Legal effect on marriage	Penalty to parties	Percent Negroes in pop. 1940	Other provisions	Civil impediment in Canonical terms
Alabama	N	VJ	— 2 – 7	34.7		Diriment*
Arizona	N M MA	VL	– 300 – 6m	3.0		Diriment
Arkansas	N	VL	— 1m – 1	24.8		Diriment
Colorado	N	VL	50 – 500 3m – 2	1.1	Former Mex. Ter. excepted	Diriment
Delaware	N	VL	100 – – 30d	13.5		Diriment
Florida	N	VL	– 1000 – 10	27.1		Diriment
Georgia	N M Ma I	VL	— 1 – 2	34.7		Diriment
Idaho	N M	VL	– 300 – 6m	0.1		Diriment
Indiana	N	VL	100 – 1000 1 – 10	3.6		Diriment
Kentucky	N	VL	500 – 5000 3m – 1	7.5		Diriment
Louisiana	N	VL	— – 5	35.9	I– N Not to marry	Diriment
Maryland	N Ma	VL	— 18m – 10	16.6	Ma – N Not to marry	Diriment
Mississippi	1/8N M	VL	– 500 – 10	49.2		Diriment
Missouri	N M	VL	100 – – 2	6.5		Diriment
Montana	N M	VL	– 500 – 6m	0.2		Diriment

TABLE I (Continued)

RACIAL RESTRICTIONS ON CHOICE OF MARRIAGE PARTNER
LEGAL STATUS BY STATES

State	Partner prohibited to white person	Legal effect on marriage	Penalty to parties	Percent Negroes in pop. 1940	Other provisions	Civil impediment in Canonical terms
Nebraska	1/8N M	VL	$\frac{-100}{-6m}$	1.1		Diriment
Nevada	N M Ma	NV	$\frac{500-1000}{6m-1}$	0.6		Impeding**
North Carolina	1/16N I	VL	$\frac{\quad}{4m-10}$	27.5		Diriment
North Dakota	1/8N	VL	$\frac{-2000}{-10}$			Diriment
Oklahoma	N	VJ	$\frac{-500}{1-5}$	7.2	N – I Not to marry	Diriment
Oregon	1/4N M Ma 1/2I	VL	$\frac{\quad}{3m-1}$	0.2	Issue Legitimate	Diriment
South Carolina	1/8N M Ma I	VL	$\frac{500-}{1-}$	42.9		Diriment
South Dakota	N M Ma	VL	$\frac{-1000}{-10}$	0.1		Diriment
Tennessee	1/8N	VJ	$\frac{\quad}{1-5}$	17.4		Diriment
Texas	1/8N	VL	$\frac{\quad}{2-5}$	14.4		Diriment
Utah	N M Ma	VL	$\frac{300-}{-6m}$	0.6		Diriment
Virginia	N M Ma	VL	$\frac{\quad}{2-5}$	24.7		Diriment
West Virginia	N	Vb	$\frac{-100}{-1}$	6.2		Diriment(?)
Wyoming	N M Ma	VL	$\frac{100-1000}{1-5}$	0.4		Diriment

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Abbreviations

A.A.S. *Acta Apostolicae Sedis*
A.S.S. *Acta Sanctae Sedis*
C.I.C. *Codex Iuris Canonici*
Denz. *Enchiridion Symbolorum*
DTC *Dictionnaire de Théologie Catholique*

INDEX

VITA

Joseph Francis Doherty was born June 9, 1914, in Camden, New Jersey. He attended Saint Joan of Arc and Saint Mary Parochial Schools and the Camden Catholic High School in the same city. In 1936 he received the degree of Bachelor of Science from Villanova College, Villanova, Pennsylvania. After two years of employment as an electrical engineer in Pittsburgh, Pennsylvania, he entered the minor seminary at Saint Charles' College, Catonsville, Maryland, as a seminarian for the Diocese of Camden, New Jersey. In 1940 he was enrolled as a student in the Basselin Foundation of The Catholic University of America, Washington, D. C., and while there he received the degrees of Bachelor of Arts in 1942 and Master of Arts in 1943. His seminary training was completed at The Theological College of The Catholic University of America, from which he received the degree of Licentiate in Sacred Theology in 1947. On May 31, 1947, Father Doherty was ordained to the priesthood for the Diocese of Camden, New Jersey. His graduate studies were undertaken at The Catholic University of America.

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